OW TO SUPPRESS
A MALPRACTICE
SUIT

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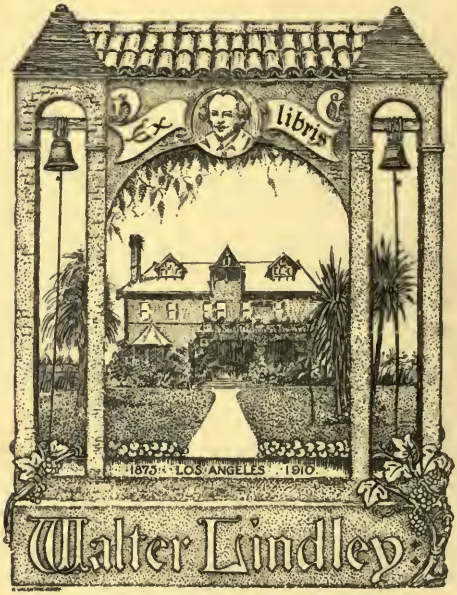
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HOW TO SUPPRESS

A MALPRACTICE SUIT

AND

OTHER MEDICAL MISCELLANIES

BY

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TO
THE PHYSICIANS
OF AMERICA, OFTEN OVERWORKED
AND ALMOST ALWAYS UNDERPAID, YET IN DAILY
DANGER OF LOSING ALL—HOUSE, HOME, EVEN PROFESSIONAL
REPUTATION—THROUGH THE INABILITY OF UNTRAINED JURIES TO COMPREHEND MEDICAL SCIENCE, THIS LITTLE BOOK IS DEDICATED IN THE SINCERE HOPE THAT SOME TIME, SOMEWHERE, IT MAY PROVE
TO BE THE MEANS OF PROFESSIONAL SALVATION
TO SOME STRUGGLING AND LEGITIMATE DOCTOR

CONTENTS

NOTE.

Of the eight miscellanies which go to make this book, Number II has appeared in the "St. Louis Medical Review;" Number III, in the "Journal of the American Medical Association;" Number IV, in the "New York Medical Journal;" while Numbers VII and VIII are in process of appearance in the "New York Medico-Legal Journal." The rest—including the title-piece—appear now for the first time.

Possibly an apology is due for the somewhat heterogeneous character of these "miscellanies." My excuse is that they *are* miscellanies, and, also, that, miscellaneous as is their character, they are all at least intended to be of interest to doctors.

I.

HOW TO SUPPRESS A MALPRACTICE SUIT.

I.

HOW TO SUPPRESS A MALPRACTICE SUIT.[1]

Catch the other doctor in the case and suppress *him.*

Oh, yes, there *is* another doctor; there is *always* another doctor. A doctor behind the party that brings the suit is just as essential as a tap-root is to a tree. He affords the suit its nourishment. He is the mainspring of the action. He is the *sine qua non.* He is the specific microbe, without whose blighting influence the malpractice malady would scarcely develop so much as a single prodromic symptom.

Well, and how do you suppress him? how do you suppress the other doctor in the case?

Before I pass to a consideration of the ways, I will attempt to provide for those ways an adequate justification. This may seem, perhaps, a little like getting the man before the wheelbarrow, but it is, nevertheless, very much the better method. And to justify the plans which I am about to offer for the suppression of a suit for medical malpractice, I will simply review in brief the history of a typical case of the malady in question.

[1] It is useless to attempt to avoid suits for malpractice by getting patients, or their natural or legal guardians, to

You are a physician and you have striven extremely hard to get to be one. To years of general education you have added years of technical drill and discipline. All this time you labored gratis; you even paid out money for the privilege of performing the uncompensated work. And it has been good money you have spent—money, perhaps, you worked hard for with inexperienced hands. Perhaps you worked often when your study-wearied nerves were clamoring for rest, both physical and mental. And at this very point I wish to remark that brain toil is more exhausting by far than labor which is merely of the muscles. Those who work with their hands only may laugh, as they sometimes do, at the idea of brain "labor," yet only give to such people one-half hour of actual serious study and they will beg to be allowed to return to the mechanical, repetitive acts of unskilled manual occupation.

Time went by, and you were graduated. Not even then, however, were your years of uncompensated labor at an end. There came still more horrid lengths of dragging time—centuries, even millenaries they seemed to you—of unpaid practice; practice without so much as certain foreknowledge of a final clientele that would pay. At last, however, you did begin to get a good practice. A few years more and you were making some money—not much, but a little

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agree in advance that, in case of an unfavorable outcome of the treatment, a suit will not be brought. Such contracts are held universally to be against public policy and therefore void.

more than would suffice for daily needs. That was professional success. Your long-delayed marriage was consummated then, and since that consummation children have come and brightened the home which you had prepared for them.

Now every dollar you acquire is something more than a dollar merely. It is food for your family. It is clothing for your family. It is comfort and happiness for your family. You are moving along in years and are beginning to feel the first vague weaknesses of approaching age. However, you are commencing also to see your little savings, by virtue of your economy and cautious investment, increasing to a moderate competence. You are very happy.

Yes, you are happy. Not so, however, your envious rival. The success which has brought comfort to you and yours, brings to him nothing but malice and hatred. Your honey is his wormwood. And, as your prosperity increases, his jealousy undergoes an enormous hypertrophy. There can be no doubt that his morbid feeling grows at a much faster rate than your good fortune. That feeling has, however, as yet resulted in no definite plan of action.

One day, in a rare and welcome time of leisure, you are sitting in your office. You are looking comfortably about you. Though the office is well appointed, it is not very large. And the making of well-nigh every dollar that has gone into the appointments of that little room you can easily recall. That glass-top table, for instance. How your mouth for months "fairly watered" for it. One night you drove to Hen-

derson's when hell's fire seemed paradoxically dropping from heaven—when the horse himself shuddered and at times would not respond to the lash. You worked all night like a negro, and you saved the life of the wife and mother. You charged a fair and proper livery bill—saying nothing of your services—and you took the money and added it to another three dollars (which you had been hoarding for ages) and you got that glass-top table. So with other articles. You know how you came by each. And it was honestly.

Now enter your office a man and his "woman" —as this sort of fellow delights to call his wife. The wife has a compound fracture of the radius. The white bone shows through the bursted skin. You slit the dirty sleeve. You slit the dirty undersleeve. You wash, you clean off—heaven only knows what, and with what a feeling of repugnance. You disinfect—gladly. Then perhaps you etherize to reduce. It is all much trouble. The case is hard and worrisome.

After all, you have done a good job—everything considered. Hamilton, we will say, could, in this particular case, have done no better.

However, each time you go to see the woman you find the dressings disarranged and soiled. The limb itself, too, speaks of unauthorized applications. You accuse, frequently; but, each time, you are met by outrageous denial and extravagant laudation of the denier's veracity. At last there is much swelling, lividity, lymphangitis. Then come rigors. In a hurry,

you amputate. Even then, though you do not save limb, you save life. All through the night-marish case you remember former bills unpaid, and you have the distinctest memory of one raw and wintry day, when, while you washed your own muddy buggy, this great hulk of a husband stood by till you finished, talking the while, with his warm hands in his warm pockets, of symptoms and of symptoms. Eventually he suggested, "Perhaps, I reckon, you better jest step out agin, if it ain't too muddy." You had symptoms of your own, but could not describe them.

Why have I imagined such a case? Because it is typical. A skilful and obliging doctor, a lazy and necessitous husband, a dirty and intermeddling woman—these elements are the essentials of a typical case for a suit for medical malpractice. Decent people sometimes sue, it is true; but not often. Quacks, furthermore, are sometimes sued; but not often. Some way, somehow, for some undiscernible reason, these butchers and botchers seem never to get seriously caught. Patients come away from their dens hoodwinked, deaf, dumb, blind, lame, paralyzed, and even cold—their troubles arising indisputably as a result of their ignorance—and yet scarcely a voice is ever lifted up against medical humbugs—except, to be sure, the feeble, the unheeded, the apparently self-interested protest of the legitimate physician.

But the legitimate physician—he is the scape-goat; he is the man that catches the trouble. Nine times in ten, too, he catches it as a result of the patient's own contributory (though possibly unprovable) neg-

ligence, or active and even malicious interference. In a great proportion of cases, moreover, the trouble arises among families so poor, so dirty, so unbred and boorish that nothing but the spirit which actuates a Christian missionary to go to heathen wilds had impelled the physician to undertake the necessarily ungrateful task.

However, the thorough legitimacy of the physician, the stupid negligence or ignorant interference of the patient, even the rank necessitousness of the indolent family, would not, all told, suffice to start a suit for malpractice without the little leaven that the jealous competitor adds to the lump of otherwise inactive material.

He does it "in a way," in a way that is shrewd. He does not say outright, "Sue him." He professes, perhaps, to have misunderstood some chance remark, such as, "I'll see him." "Oh, no," says Dr. Stir-im-up, "don't sue him. Don't sue him. You might, to be sure, get considerable damages—no doubt you could—but the man's worked hard for his money. I wouldn't sue him." This only suggests in a forcible manner what is apparently the easiest possible way of getting money. Everything to win, nothing to lose.

You will receive from your brother physician much pretended sympathy. "I told them not to sue," he says. (The plaintiff, of course, afterward gratuitously confirms the statement.) "I am really sorry," the brother goes on. "I'll help you all I can."

On the trial, however, he breaks down easily. The plaintiff receives the impression that he wants upon the jury. The verdict is the plaintiff's.

Now you sell your office and its appointments—the little glass-top table and the book-case. The bit of farm goes—the farm that was to educate your children.

Your wife turns gray. Your own face wrinkles. Patients do not stop so often as they did.

You are getting too old now to look for new locations: you will stick it out.

Your competitor greets you smiling. He has good cause to smile. The plaintiff assures you, "We let you off easy, Doc," and even hands you a clammy paw—not badly calloused—to show you he is a Christian and can harbor no malice.

Devilish? Yes, and not overdrawn.

What will you do?

Catch the other doctor and suppress him.

Suppress him.

Suppress him by all means fair, square and truthful.

Be honest, but nevertheless suppress.

Manufacture no lie, but seek out every truth, every fact, every actually existing thing that will act as a thumbscrew, and turn them all onto him. Turn them good and tight. Then turn them some more. Then still more. Turn till the rascal will be overjoyed to work himself to death trying to undo the mischief he has done.

As the mode of procedure will vary in different cases, I will try to set forth a variety of modes. Not every measure, of course, will here be attempted, but only such as will undoubtedly suggest all others that

may be necessary. Moreover, almost all the measures I suggest will be found severe. Serious diseases call for serious treatment; and when a man is fighting for his professional reputation, for his home, for his family, he will fight head up till he falls, or he deserves no family, no home, and no reputation.

In the very first rank of ways whereby to put the thumbscrews on the well-wishing confrère is that whereby you utilize the fact of his drug-taking—if, indeed, he be a taker of drugs. One doctor in five, according to trustworthy assertion, is an inordinate user of drugs. Assuming the proportion to be correct, then well-nigh twenty per cent of all suit-starters can be suppressed by the use of this one fact alone.[2]

How? In this way. A morphine-eater, or a cocaine-eater, is a helpless liar. That psycho-pathological proposition may,[3] and can, be proved by expert testimony at any time and beyond all question. Now, if you can merely secure evidence that the doctor in question is an inordinate user of drugs, you are safe. And the problem of collecting evidence is easy. If the habit has been of long duration, the habitué will have taken cures, have been in sanitariums, homes,

[2] This simple computation does not take into account the fact that drug-users are more likely to be starters of suits than are normal, clear-headed physicians.

[3] "Greenleaf on Evidence," 16th ed., p. 576.—"An impairment of the faculties from the use of morphine is equally relevant." Cases cited: Lord Stafford's Trial, 7 "How St. Trials," 1401. Maharajah Nuncomar's Trial, 20 id., 1035; Matthews v. Lumber Co., Mich., 67, N. W. 1008; State v. Stein, 79 Mo., 330; Martin v. Barnes, 7 Wis., 242.

retreats. He will have had to buy large quantities of his favorite drug in his local drug stores. Sometimes he will have been compelled to take suddenly large quantities of the narcotic in places where he may necessarily have been observed. If he uses a syringe, the indisputable evidence will be found upon his person. The matter is easy. Only don't go about it yourself. If you do, you will blunder—sure. Secure the services of a skilful detective and get all things ready before your gentleman so much as suspects your simple, yet very effective, design.

When you have your evidence, don't wait till trial to present it. Have a heart-to-heart talk with your loving competitor, in which you casually mention that *you have already secured* indisputable evidence of his drug-taking, and that, in case your suit for malpractice should come to trial, you know how to challenge testimony. Should your rival be so foolish as to let the case go to test, his testimony will be found of no value, and the accusation, of course, will fall to the ground. Nineteen times in twenty, however, the day you mention the drug-taking you will have heard the last of your malpractice suit. The gentleman will not want his opium-taking, or cocaine-taking, proclivities aired in the way that even the most ordinary lawyer would certainly know how to air them.[4]

That is one way. If the suit-starter belongs to a different school of medicine, do not forget that his

[4] In a case of which I have heard, the plan I advocate was tried and the suit was suppressed like magic, though the fact was later found out that the starter of the

testimony as to the correctness of your treatment is not admissible.[5] Sometimes this little piece of legal information is quite as well held back till the time of the trial and then sprung—when the enemy has no time left in which to dig up another willing witness, whose school would, of course, be yours and no other. One must use one's judgment.

Perhaps the best method of all, whereby to get the medical nigger out of the wood-pile and demolish him, consists in starting a counter-suit of some sort—preferably an action for malpractice. *Similia similibus curantur.* When it is the other man's ox that is being gored you have literally no idea how sorry that other man is. How detestable a thing a malpractice suit suddenly comes to be in your competitor's eyes when he develops a fulminating case of his own. It is positively an outrage, a crime, a deformity on the body politic that suits of that character are permitted to be brought. You can readily find a case against him—of course, through a quiet and capable friend. Have nothing to do with the matter yourself. Find the negligent patient, the necessitous condition, the apparently unjustifiable outcome of your competitor's treat-

suit was not really a fiend—at least a fiend of the drug-consuming variety. The fear that he was about to be accused of "morphine-eating" or of "cocaine-taking" in a crowded court-room, and in his own community, caused the gentleman in question to find "some features in the case he had not considered before," and to present them to the plaintiff with astonishing alacrity.

[5] Bowman v. Woods, 1 Greene, Ia., 441; Patten v. Wiggin, 51 Me., 594; Force v. Gregory, 63 Conn., 167; Nelson v. Harrington, 72 Wis., 591, 40 N. W., 228.

ment; the natural desire to get something for nothing on the part of the right (which is to say the wrong) sort of persons will accomplish all the rest. Certain kinds of ears are always open to certain kinds of suggestion. Merely choose wisely the kind of ears.

Finally, there are other ways, many of which will occur to you as the affairs of your beloved brother become disclosed through the insidious probing of a skilful detective. *Don't be afraid to probe.* It is sometimes astonishing, as an old lady busybody once remarked, what a body will find when a body begins to look about her. A story is related of a man who once, when away from home on a lark, sent back to the very best man of all his acquaintance an anonymous telegram to this effect: "Fly at once:—all is discovered." It is said that the recipient of that joking telegram disappeared immediately and was never heard of afterward. Of course, the implication of this story is too strong. Nevertheless there are men whose lives, if placed beneath the X-ray of first-class detective ability, would disclose strange facts—facts, often, of great value to the man fighting for home and reputation. Some of the things which painstaking investigation will occasionally bring up to daylight are these: The doctor in question, if the plaintiff be a woman, is, or has been, on terms of too great intimacy with her. Or he is one of plaintiff's kin; that fact, however, being, for certain reasons, unknown. Or plaintiff owes him money, which money the plaintiff would never be able to pay did not this suit succeed. Of course, such facts would destroy completely the

force of your unprofessional brother's testimony. Sometimes a damaging fact which, in court, would unquestionably be held to be wholly inadmissible as evidence would yet, nevertheless, be of delightful force as a squelcher of suit before trial (the very best time to do the squelching) because your kind competitor would understand that the simple attempt to introduce the disgraceful fact—the mere asking of the question in public—would damage him irreparably in the eyes of the community.

These, then, are some of the ways whereby a man can suppress the medical prompter of his malpractice suit, and, through him, the suit also. Some suits, however, can be suppressed by suppressing the plaintiff.

Now, how to squelch him.

He is not so likely to be a user of drugs as is his medical prompter, yet he may indeed be a user of drugs for all that.[6] If he is, let him know how you intend to make use of the fact. His addiction to narcotics will make all his evidence unreliable; and, of course, it may have rendered a perfect recovery from sickness more difficult. Moreover, as in the case of the physician, though not perhaps to quite the same extent, a public exhibition of the plaintiff's weakness would be a disgrace to him.

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[6] Gould & Pyle, "Anomalies and Curiosities of Medicine," 1901, p. 507: "According to Mr. Cobbe, there are in the United States upward of two millions of victims of enslaving drugs entirely exclusive of alcohol." Not all of these are doctors, for there are only a hundred and fifty thousand doctors.

Again, there is syphilis. If there be a suspicion of syphilitic taint in the family, do not forget that fact. Sometimes it may be best to reserve the use of the fact until the trial. In many states physicians are not allowed to testify as to such matters. These are the so-called laws of privileged communications.[7] However, do not forget that when a physician is sued for malpractice the seal of professional secrecy is removed and he may speak out, then, devoid of absolutely every fear of legal consequences. The effect on a jury, as well as on public opinion, of such a defense as syphilis is simply tremendous—much greater, perhaps, than even the sufficiently terrible facts concerning that detestable disease would justify. By far the better way, however, as a general rule, than to wait until court time, is to secure a heart-to-heart talk with your plaintiff before trial. Have it in your office or your house, if you can. If you can't, then wherever possible and proper. An improper place would, undoubtedly, be any spot where persons other than yourselves could hear. Whatever you say to plaintiff only, you can never be held in damages for on the ground of slander. If, however, you are careless and permit third persons to overhear you, you may be so held.

[7] These laws of privileged medical communications are popularly supposed to seal up the physician's lips at all times and in all places. This, however, is merely a misconception. These laws are simply rules of evidence restraining a physician on the witness-stand from testifying to certain matters learned by him in his professional capacity. Of course, the law of slander and libel (oral and written statements which are both damaging and untrue) operates at all times.

Even the slightest suspicion of syphilis will almost always end a suit before it is brought to trial, for who, even of the very lowest social orders, cares to contend in public against an accusation of so frightful a character?[8]

The fact of tuberculosis, also, or of certain other transmissible diseases will sometimes prove to be an effective weapon if used properly. One need merely talk of the fact that these diatheses are coming more and more to be looked upon in the light of disgraces, that such constitutional weaknesses often prevent one's daughters from marrying, etc., etc. The fact, however, should always be kept very clearly before the gentleman, *should he happen to have heard* of the law of professional secrecy, that the rule of professional secrecy absolutely does not apply when a physician is sued for malpractice. The physician must, of course, at such a time, be allowed to speak out freely and fearlessly concerning all facts, otherwise, the law would be placing itself in the position of summoning a man to defend a suit and then of not permitting him to defend it.[9]

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[8] Throughout this article (as already vaguely suggested) it is assumed that the defendant is accused wrongfully. Strangely enough, he is almost always so accused. The actually incompetent man is seldom sued. Should the defendant have been accused with justice, let him settle promptly and as best he may.

[9] Becknell v. Hosier, 10 Ind. App., 5, 37 N. E. 544.—"To establish a contrary rule would be manifestly unfair." See also Lane v. Boicourt, 27 N. E., 1111; Winner v. Lathrop, 67 Hun., 511 (N. Y. Supr. Ct. G. T.).

Witthaus and Becker, vol. 1, p. 114, citing Mark v. Manhattan Ry. Co., 56 Hun., 575 (N. Y. Supr. Ct., Gen.

The threadbare trick of criminal law—delay—may, in some circumstances, be justifiable and satisfactory. The longer the time before your case is brought to trial, the more likely are your adversary's witnesses to become insane, to move away, to die. Sometimes the physician that started the suit will regret his act, or the plaintiff will regret his—only for reasons that happen to present themselves as time passes. The various ways whereby delay may be secured will readily suggest themselves to the reader, according to the circumstances of the particular case. I have heard of a physician spiriting away one of his own best witnesses, after which he got a continuance from term to term on the ground that his main witness had been spirited away. Eventually the plaintiff moved to Ohio (the suit was in Illinois) and the suit was stricken from the files.

After a time—it will be remembered in this connection—the law of limitations "runs against" the action.. In some states a suit for malpractice must be begun within a very short time—as short, indeed, in some states, as only two years. The law on this mat-

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T.) :—"But where the patient testifies as to what passed between him and his physician, the physician may testify on the same subject, as a waiver is inferred from the same circumstances; for the reason that the patient, having gone into the privileged domain to get evidence on his own behalf, can not prevent the other party from assailing such evidence by the only testimony available, and the rule is no longer applicable when the patient himself pretends to give the circumstances of the privileged interview."

In some jurisdictions this exception to the rule of privileged communications is expressly mentioned by the statute conferring the so-called privilege.

ter, however, varies very greatly in the different states. See a good lawyer (or two or more) and get an unqualified opinion. If the time has already run, tell your plaintiff to whistle. If it is not altogether run yet, speak kindly, and keep him patient just as long as possible. Remember, though, in connection with the statute of limitations, that time spent by the defendant outside the jurisdiction does not count. The statute stops running when the defendant goes outside the state, or even to some part of the state where he cannot easily be found, and it only begins to run again on his open return.

Sometimes, and, in fact, quite frequently, haste is even better than delay. As soon as your plaintiff has filed his declaration, or his complaint (which he will do in the circuit, or the district, court) it may be well to sue him for his bill just as promptly as you can in a court of a justice of the peace.[10] You are supposed, of course, to have tried first the out-of-court plans already mentioned. If these work, well and good. In case they do not work, sue. Your suit will be only the more likely to succeed if you have already attempted those out-of-court measures.

The reason why you sue in the justice's court is

[10] It is astonishing how many persons, without intending to do so, neglect to defend against suits for small sums in justices' courts, and even fail, when they fully intend otherwise, to appeal within the time required. Often, too, when failure to appear is unavoidable, people, for all sorts of reasons, or for no reasons, neglect to secure a continuance.

Should the patient be only bluffing, the mere starting of the suit in the justice's court will end matters.

this. A judgment for your bill there will bar forever the suit for malpractice. This is the rule in every jurisdiction in case the defendant defends on the ground that the services were valueless. And it is held in many, perhaps most, states that the suit for malpractice is forever barred even if the defense should have been on any other ground than the one just mentioned, and even should no defense at all have been made, judgment simply having been allowed to be entered by default. And this is true, too, regardless of whether the suit for the fees have been begun before or after the beginning of the malpractice suit. The great courts of New York, New Jersey, and West Virginia so hold in language as clear and unmistakable as language can be written.[11]

In jurisdictions where this rule prevails—i. e., the rule of judgment in the lower court barring suit in the upper—a physician stands a vastly better chance of defeating his malpractice fiend, if he sues before a justice, as has just been suggested that he ought to do in many cases, because, should he fail in the lower, he may yet succeed in the circuit, court; while, on the other hand, should his suit in the lower court succeed, that ends matters—unless, to be sure, an appeal be taken, which, of course, may happen in any case, and from any tribunal. In a word, by suing before the justice one doubles one's chances of succeeding against one's charge. Besides, there is the advantage

[11] Bellinger v. Craigue, 31 Barb., 534; Gates v. Preston, 41 N. Y., 113; Blair v. Bartlett, 75 N. Y., 150; Dunham v. Bower, 77 N. Y., 76; Ely v. Wilbur, 49 N. J. L., 685.

to be gained by taking the offensive—a step which puts the plaintiff in a better light before the public.

Whether to delay matters by securing continuances of the trial in the circuit court, or to hasten them by suing independently in the justice's court, is often a nice point. Sometimes the two procedures can be combined to advantage.

Don't forget that payment for work is strong evidence of its satisfactoriness. Hence, if your plaintiff ever offers to pay you, even though at a considerable discount from your established rates, you might perhaps be wise to take his offer. Should he ever after sue you for malpractice, you will stand at a great advantage over him. Get, if you can, written evidence that the bill was paid. This can sometimes be done by tendering in change your personal check, on which you jot a memorandum showing it to have been given by way of change when specified medical services were paid for. The return check is a witness that will not die or move away.

Should you be able to obtain evidence that the plaintiff and his physician are conspiring, either by themselves or with others, to make out falsely a case of malpractice against you, this evidence (if actually obtained and adduceable in court) would constitute, beyond all question, not merely a magnificent defense to your malpractice action, but also a ground for a serious criminal prosecution against all parties conspiring against you. Detailed information concerning this sort of defense, must be furnished you by a lawyer practising in your particular jurisdiction, for

law on this point varies greatly in different states, and, moreover, it changes frequently even in the same identical state.

Of all the means herein mentioned for suppressing suits for malpractice, which is the best? Beyond doubt, that of starting a counter-suit against the professional brother. *Similia similibus curantur.* Don't forget *that.* If, in addition, you also set in motion one or more of the other vigorous measures against either the physician or the plaintiff, you will be in a good way to escape the machinations of the wicked while said wicked are engaged in puzzling out a few soul-wearying problems of their own. Go to bed, then; and go to sleep. Snore if you want to. And let the other fellow, or fellows, no matter how many, attend to the worrying. Only see that they have a nice, large, big, round, fat job of it.

II.

A CASE OF GRATITUDE: SPONTANEOUS RECOVERY.

II.

A CASE OF GRATITUDE: SPONTANEOUS RECOVERY.

The rarity of the disease in question is so great as to render advisable a report of the following case, which I was fortunate enough to observe in my own practice.

The patient, a colored man, aged thirty-two, came into my office on the 16th day of last September, with a deviated nasal septum and a tang to his breath almost sufficient to account for the warping of the septum. There was at that time no rolling of the eyes, no shining of the face (beyond that which was entirely natural) and absolutely no excess whatsoever in the secretion of saliva. This is in entire accord with the best authorities, who assert invariably that gratitude is never observed idiopathically, but always as a sequel to some other affection, after the primary trouble has been relieved. A few cases, it is true, have been observed to follow the lending of money by the physician to the patient, but these cases are even rarer still—for the most obvious reasons—and hence may, for all practical purposes, be left out of consideration entirely.

Examination of the nasal passages, in this particular case of my own, was promptly made, and an operation was advised, together with such an amount of after treatment as might from the necessities of the case be found expedient. Advice was also given as to the tang, and very strong reasons were adduced to this patient why this particular tang should be left off entirely, not merely in and during the period of the treatment of his nose, but also forever and forever.

The patient replied, "I sho' never does drink nothin' stronger ner beer, an' I hain't had nary glass o' that this day." Then he called me "Boss," and after a while, "Doc." I report the precise words to show that the patient's mind was entirely clear at this time.

The operation was performed, the after treatment was given; the patient recovered from his trouble completely. The tang, too, seemed to have disappeared. Everything looked favorable, in fact, when suddenly symptoms of the terrible—and, as I say, fortunately very rare—disease in question began to appear. The first sign of the approaching malady occurred when the patient addressed me as "Doctor." At first I thought myself mistaken. Yet not so. The expression recurred, and the look of the face became strangely softened. Later, the patient said, with that humble posture of body which accompanies gratitude, "I sho' gwine pay you fer dis, some day, Doctor, when I git de money." Then there could be no doubt. Here was really a case of genuine gratitude. I stood in the presence of one of the rarest, and, while it lasts,

one of the most terrible, diseases that afflict mankind.[12]

The most violent symptoms, in this case, set in very promptly. Often, when I passed along the street, the patient would cross the roadway hurriedly in order to get to speak to me and to shake me by the hand. At such times, he invariably promised me much money, and gave other evidence of severe mental impairment. I remember that upon one occasion, before a very large crowd, he promised me a hundred thousand dollars—in case he should ever acquire that sum. I mention this occurrence especially in order to prove how nearly alike, in some respects, the disease under consideration is to general paralysis, particularly with regard to the symptom of megalomania.

The patient often suffered from other delusions, some of them of a more frightful character. One of these was that he could succeed in increasing my practice. He believed in this obsession perfectly. Sometimes, I think, he really acted in accordance with it. For this symptom I tried suggestion. I suggested that I was already so terribly overworked and leg-weary and head-weary that the large amount of practice that he would necessarily bring to me, if he persisted in talking for me as he was then talking, would prac-

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[12] Seriously, I wish to be understood as not desiring to give offense by reporting my only case of gratitude as occurring in a member of the colored race. The same disease has been known—though much more rarely—to occur among whites.

tically prove to be my undoing. But he was not amenable to this suggestion—or, in fact, to any other.

Finally, the disease disappeared by crisis. The patient actually one day brought to me a silver half-dollar, and, with beaming countenance, rolling, blood-shot eyes, quivering cheeks, and lips covered with slobber [13] as thick as honey, he pressed that coin in the palm of my right hand. His breath, which again had acquired a tang, rolled out rich and molasses-like, "God bless you, Doctor; God bless you."

Then came recovery—promptly, almost instantaneously. The payment of the half-dollar seemed to have created some profound mental impression which worked in an opposite direction to the impression produced by the cure of the septal deviation. The patient no longer crossed the street to speak to me. He no longer offered to shake hands with me whenever I happened to come near him—which was not often. In fact, one day, I found that he had so nearly recovered that he promptly turned his back upon me when I accidentally approached.

Then, one day, he came and demanded his "half-a-dollar" back. There was much tang to his breath that day, and he informed me with assurance and bravado that he hadn't had no "deviated sectum," and that all that had ever ailed him was the "drunken

[13] The slobber, in gratitude, is much thicker than that in hydrophobia. It also has a somewhat sweetish smell. The jaws, moreover, in hydrophobia, are generally set, whereas, in gratitude, they stand awfully apart, and permit to pass through them just whatsoever the lungs happen to pump up in the shape of words.

broke nose." And I hadn't really quite cured *that,* said he.

So he wanted back his "half-a-dollar." Happening to have a "half-a-dollar" handy, I let it go, knowing full well that the tang would go with it. And I have neither seen the one, nor smelled the other, from that day to this.

Now, what is the point of this whole matter? Why, simply this. Never to over-medicate in such cases. In fact do not suppose, my brethren, that medicine is really necessary at all for the cure of gratitude. Gratitude will cure itself. Nature, in this, as in so many commoner affections, will work wonders. I do not believe there is a case of gratitude on record which has not got completely well; and the vast majority of cases have recovered even without treatment of any sort whatsoever. Especially do I deprecate the pernicious performance of operations in these cases—such, for instance, as the removal of a portion of the skull from over that part of the brain supposed to control the movements of the heart. The heart, I believe, has nothing to do with this disease. It only seems to have. The rapid, excitable pulse which has been noted in some cases of gratitude is a mere incident, due perhaps to a running upstairs in order to do hastily some tiny insignificant thing which the subject supposes will assist in the carrying out of the plans engendered by his imperious and mistaken conceptions. No, do not operate. Let these cases severely alone. They always recover, and of themselves. Great is the *vis*

medicatrix naturæ, and great also is that *vis naturæ generatrix* which for us physicians produces such rare and beautiful (considered scientifically, at least) forms of disease, and in so nearly an infinite variety.

III.

MEDICAL INSTRUCTION OF THE LAITY IN THE LAY PRESS.

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It is certainly unwise for physicians to attempt professional instruction of the laity in the lay press by means of signed articles. In the first place, such articles blur the distinctions between their writers and advertising charlatans; in the second place, the tendency in such articles is to say the brilliant rather than the true.

Yet, after all, should not the laity be instructed medically in the lay press? By all means. The instruction in physiology and hygiene presented in the common schools is distinctly inadequate and is, moreover, imparted to the learner at a time of his life when he can not by any possibility correctly estimate its importance and therefore the necessity of remembering it far on into later years. Besides, in the common schools practically nothing is said of disease. It might be urged that the less the laity learns of disease, the better for the laity. But notions of disease, superficial though they necessarily are, the laity will have, and if it does not get them from doctors, it will get them from almanacs, fences, barns and billboards.

To anyone practising medicine it would seem un-

necessary to urge the immense amount of harm that comes from wide-spread medical misinformation. The worry and depression in cases of disease that are either slight or non-existent; the difficulty on the part of physicians to secure intelligent coöperation, especially in the country; the enormous amount of injury from the use of patent medicines; the large number of lives lost that might have been saved had the patients had in time the slightest inkling of the real nature of their maladies; these are a few of the considerations which to any thinking physician present themselves at once.

How should the matter be gone about? The plan, it would seem, should be this. Let a competent staff be chosen yearly from among the members of the American Medical Association, whose duty it should be to furnish a very large proportion of the lay press (as literary syndicates furnish stories, poems and the like, but without cost to the press) a considerable number of unsigned articles (simple, clear and of course honest) on such subjects as would seem to the staff as a whole to be proper and important for the general public to consider. Plenty of competent writers would lend themselves to the purpose.

Let it be borne in mind that the subject chosen should be such as seems to the staff as a whole proper and important for the general public to consider. There is no doubt that a staff chosen from among the members of the American Medical Association could be altogether trusted to make a wise choice of subjects. Some of the possible themes that suggest them-

selves to the present writer are these: Why Promiscuous Spitting should be Prohibited. Why Legitimate Physicians do not Advertise. What not to do while Waiting for the Doctor. The Truth about Catarrh. Some of the Swindling Methods of "Traveling Physicians." Pain in the Back no sign of Bright's Disease. Old and Discarded Methods of Treatment Revived under new names by Quacks. On these and a multitude of other topics, the laity is sadly in need of information.

It might, of course, be contended that the masses simply will not learn. But it is certainly true that the masses do learn, only they learn the wrong things; and may not a partial explanation of that fact be found in the further fact that the right things are so seldom, indeed almost never, presented to them? Then, again, not all people are blockheads, and there are no doubt in existence a number of persons who might, good sooth, have comprehended some medical matters, but who merely happen never to have studied medicine. Finally, to present to the laity the truth about matters concerning which the laity is already in possession of the error, certainly could do no harm.

IV.

HIS FIRST CATARACT.

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Dr. Theophilus Lightbody had practised general medicine for five years. Then he had determined to become an oculist, or rather a specialist on the eye, ear, nose and throat. Accordingly, he had betaken himself to a graduate school in New York City. There he had remained for six months. Finally, he had returned to the place of his former practice, and extended from the old office a new shingle.

Then he had waited—waited, waited, waited patiently and impatiently. And he had waited, and he had waited, and he had kept on waiting. Scarcely an eye case came to him, save those from members of his own former families, and these were never very serious cases. Clearly, it was not so easy to establish a practice in the eye, ear, nose, and throat as he had formerly dreamed. He had supposed that all his *quondam* general confrères would naturally be so pleased to see him leave the ranks of general medicine, that they would promptly refer to him very much work, at least in that exceedingly esoteric specialty, the eye. But all his former friends among the doctors, though to all appearances quite as friendly still as ever, kept as carefully to themselves their

special cases as, in former days, they had kept their fevers and fractures and childbirths. In a very few years, it is true, Dr. Theophilus Lightbody came to find them all—but that is quite another condition which obtained long, long after the close of this story.

So now for the story itself.

Well, one day, when the waiting had worn on Dr. Lightbody's naturally highly sensitive nervous organism (which, by the way, had never been hardened and toughened by the practice of any particularly large amount of general surgery—for the small city in which he lived was totally devoid of shops and factories and mines); well, one day, when the waiting had pretty well worn upon the doctor's nerves—or "nervous organism," as he would himself have termed those little structures—hark! listen! Yes, there it was—the step of a patient. Indeed there were two—not two steps merely, but two sets of steps, possibly two patients.

Now, how did Dr. Lightbody understand that those footfalls were the footfalls of patients, or, at least, how was it he could know that one set was undoubtedly that of a patient, while the other might either have been the set of a second patient or of some mere friendly companion of the first. I can not say exactly how, but you, dear professional reader, *know* how, and *I* know how, and we both know that we both know how, and we both know that Dr. Theophilus Lightbody knew how also. Why, bless you, Dr. Theophilus Lightbody could tell that that was a real, genuine, bona fide patient that was coming up

that stairway just as easily as a dog can tell when his master comes poking kennelward with a good-sized chunk of liver.

And it was indeed a patient. The sets of steps stopped at the doctor's door. The door pushed slowly inward. For a moment, by reason of the brightness of the office and the darkness of the hall, Dr. Lightbody could not discern a solitary sign of a patient. Then there entered—well, his first cataract. The patient—not so interesting as the cataract—was an old, stoop-shouldered man. By his side, and guiding him, was a girl of about eighteen.

"Does Dr. Lightbody live here?" asked the old man, in that loud, positive voice of the retired (which generally means solvent) farmer.

"*I* am Dr. Lightbody," said the specialist, taking the pose he had always thought most dignified, most physician-like.

"Make a speci*al*ity of the eye, do ye, Doc?"

"Yes, I am an oculist."

"Thought I'd jest run in an' see ye a minute. Got somepin' the matter with me eyes. Don't suppose you can do nuthin' fer 'em—somepin' growin' over 'em—but ye don't charge nuthin' for no examination, do ye?"

"No."

"Huh? Say that agin."

"No, I don't charge for examining."

"All right, then. Fire away."

Dr. Lightbody—it may have been the result of his highly developed nervous organism—was about

as particular concerning the details of his case-histories as is an old maid concerning the hairs of her cat. So he pumped old Mr. Winters nearly dry of everything pertaining to his own person, to the persons of nearly all his family, and of his father's family, and, finally, of the cataractous condition of the eyes. Then the doctor wrote for nearly half an hour. At last, he tested the patient—very, very thoroughly. Then he wrote for half an hour again.

"'Pears like it takes an awful long time to look at me eyes, Doc," commented the old man.

"All over," said Lightbody. "I will give you the diagnosis—cataract, senile cataract. Now, a cataract is an opacity of the crystalline lens of the eye. It begins—"

"Know just how it begins myself," broke in the old man. "But what's a-goin' to be the end of it?"

"Mr. Winters," said the doctor, "I can cure you. It will, however, require an operation."

Now, just as the doctor uttered the word "operation," a kind of something seemed to strike him in the epigastrium, and to radiate thence all over him. An operation seemed suddenly to have become to him a rather serious proposal. However, he paid but little attention to the symptom—which, by the way, disappeared in a moment.

"Well, Doc," said the old man, "if you can't cyore it without no cuttin', I guess I—"

"Oh, yes, you will, grandfather," put in the girl, "oh, yes, you will. It isn't *very* painful, is it, Doctor?"

"He will not feel the operation at all," replied the doctor. "Nor will he have to take a general anesthetic—go to sleep all over, you know. A drop or two of cocaine in the eye—he will feel nothing."

"Oh, well, if *you* say so, Minnie," replied the old man. "I guess you can go ahead, Doc, an' operate."

Now, again, at the utterance of this peculiar word, "operate," a something seemed to strike the doctor once more below the belt—only, this time, perhaps a little harder than before. He was conscious that he felt a trifle as he used to feel at school when about to speak a piece. He became suddenly aware that the corners of his mouth were drawing down. He tried to smile to cover the peculiar expression he knew was resulting.

He went ahead and arranged with Minnie and her grandfather the various matters looking forward to the operation, just as if he had never had a single nerve in all his little frame. "Two weeks from Tuesday," he replied at last, as he jotted a little entry in a slick new memorandum book. "Tuesday two weeks, and at two p. m. All right. I'll not forget it. I'll be there."

Then he bowed them out, and closed the door.

He stood as if in a dream—head down, left hand behind the waist, the right, half closed, before the lips. So he stood for some time. Finally, he heard the last of his first cataractous patient's steps upon the stairs.

He shot to the window. There he stood with one hand holding the other about an inch in front of

his stomach. Unmoving, he watched the old man and the girl pass slowly down the street, along the granitoid sidewalk. "There," he reflected; "there is the man whom *I—I—I*—am to restore to sight—to sight, to sight, to light, to life. I am the one that is to do it. *Can* I do it?"

The doctor needed not to be so fearful, for he was really competent. He had read much, and seen more, and had practised on the eyes of hogs and sheep and cows and human cadavers for hours and hours; he could really almost have done the operation in the dark. Nevertheless as he stood and watched the old, stoop-shouldered man, the same peculiar bombardment of the anterior wall of the stomach again took place. Suddenly, in a flash, he saw himself with his knife in the old man's eye—*him—himself*. A pang of fear shot from the solar plexus to the heart, and that unruly member began hammering at the ribs like a schoolmaster trying to quell confusion in a school-room by hammering on his desk. A great roll of thunder burst sudden, deafening, jarring and reverberating, after an almost simultaneous blinding flash directly above his office, and then it went spreading slowly and majestically over the heavens in alternating diminuendos and crescendos till it died away among the far distant hills.

The sublime sound for a while calmed and comforted the doctor.

A heavy rain began to fall, and he sat down face to the window, putting his feet upon the sill.

Next morning he awoke with a start. He was all alert.

What was it? The operation. Again his heart began to beat, beat, beat. He became painfully conscious of both his goitre-like carotids. A slight choking seized him at the base of the throat. His eyes seemed pushing forward. He imagined he knew how exophthalmic patients feel. He understood, too, how fright might sometimes be the cause of exophthalmic goitre. Beat, beat, beat. How hot his face was! Beat, beat, beat. How cold his hands were! Beat, beat, beat. How good they felt to his temples! Beat, beat, beat. His legs seemed full and heavy, as he put them out of bed. Beat, beat—

Nonsense! he would stop this, stop this foolishness, stop this absurd, this unexplainable cowardice. He would stop it all, stop it at once, stop it immediately and forever. He would— Yes, yes, he would read up. That was what he would do. He would read up. He had merely been afraid that some important matter might have escaped him. That was all. That was the only thing that had caused him these tremors. He would read up. Yes, he would read up. Yes, he would reassure himself. Then he would be himself again.

He dressed hurriedly, and, after a tiny bite of breakfast, he almost ran to the office.

Fuchs and Knapp. Stellwag and Königstein. Then all the rest of them. Books, atlases, journals. The more he read, the faster and more feverishly; and the faster and more feverishly beat his heart.

He took an aconitin tablet. That eased the pulse a trifle. But not much. He took bromide. Still he felt no better.

Suddenly, and happily, a friend came and took him off to dinner. The friend was a man of leisure, and, when dinner was done, he invited the doctor to a little game of checkers. Now, to a genuine lover of draughts, there is no such thing as a "little" game of that game. At all events, if it begins as a little it soon hypertrophies into a big one. "Best two out of three." "Best three out of five." And so along and along. All the while, at intervals, a little recurrence of memory would thrill the doctor in his epigastrium. These appeared to be exactly the same thrills that he had had once in boyhood when he went to propose to a little sweetheart. Oh, well, after all was not this cataract performance equivalent to a proposal to the doctor's first "really and truly love," his most bowed-down-to goddess, the mistress of his whole and entire, his altogether conquered, being—Miss Ophthalmic Surgery?

Pleased with his own conceit, he smiled. The smile gave him a bit of temporary confidence.

"I see you grinning," his antagonist remarked; "but I have you cornered all the same." Had that remark an inner, a fatalistic, meaning? queried the little doctor of himself, almost seriously.

Then there were drinks.

Next day he awoke with an aching head. His heart, however, was calm and quiet. "Cure by crisis," he remarked.

Slowly he dressed. Slowly he went down his boarding-house stairway. Slowly he ate his breakfast. Finally, he proceeded to his office with sedate

and equable step. Arrived at the office, he began once more to contemplate the future—the operation. Again a little jab in the stomach.

He would practice all the steps of the operation in the air. That would keep this foolishness, this ridiculous stage-fright, this nonsensical "buck-ague" from troubling him again.

"Now see how calmly," he said to himself aloud, "now see how calmly you can do it. You're all right. You know you're all right. Be still, old fellow. Quit this everlasting poppy-cock. See how easily you can do it."

He took up the slender instrument that bears the name of Von Graefe—the little hollow-metal handle with the delicate short ribbon of steel at the end—that tiny, apparently insignificant thing that seems but a beam of condensed light, and which to thousands of forlorn and hopeless eyes has brought God's light again indeed, and, balancing this tiny affair, this little length of rigid ribbon, fraught in the present instance with so much of hope for the coming years of Dr. Lightbody as well as of the patient, and then, pinching up with the fixing forceps (which he held in his left hand) an imaginary fold of imaginary conjunctiva, he made the initial prick—beat, beat, beat—saw the bright point in the anterior chamber—beat, beat, beat—depressed the handle a bit—beat, beat, beat, hammer, hammer, hammer—began to shove onward—hammer, hammer, hammer; hammer, hammer—he threw down his instruments and rushed hatless for the outside air.

The day had come at last, after centuries of waiting. After centuries and millenaries of foolish fears and vain prognostications— After aeons and ages—

He was nervous—that he admitted. By nature he was very high-strung; well, wasn't that enough to account for a little bit of nervousness? Suppose it *was* a great deal more than a little. Well, what then? Why, confound it all! spite all the devils from hell, he would operate. He would become an expert operating oculist in spite of fate. That one thing he would accomplish, or he would die. Though he could know he would cut, and hammer, and hash, and slash and ruin the old man's eyes with uncontrollable fingers, he would operate. Though he should cut the very eyeballs from the patient's head— Though he should— He would operate if— He would operate if— A great pounding seemed to take place, not, this time, in his breast, as before, but in vast hitherto unknown recesses within the interior of his expanding brain— He became weak. His legs shook. He thought of a thing that promised certain relief. He would— No, he would not. Yes, he would. Indeed he would not.

Finally, he did what many another has done in similar circumstances.

He rubbed the shoulder for a moment, and sat down.

He leaned back in the chair, and drew a great sigh.

How calm the room had suddenly become. He heard the mellow ticking of the clock. Looking leis-

urely upward, he saw that the dial said to him that it was almost half past seven. At two he would operate.

This time the word did not impress him. In fact it seemed to have become a very commonplace ordinary every-day sort of word indeed. Yes, at two he would operate. At two he would operate. He liked now to linger on that word, operate. Ah—hum! This was a world filled with calm and indifference, with the essence of nonchalance and don't care. At two he would operate. Sometimes, as he said again this sentence, lingering on it most luxuriously, a spasm of fear would start somewhere in the back part of his brain, and run downward a short way toward his stomach, but "die abornin' "—as the doctor said to himself with a chuckle.

The clock struck eight.

Life was pleasant and easy, if one would only make it so. The cheerful philosophers had the right.

The clock struck nine.

There were plenty of things to soothe and comfort, if we only understood the way to use them. Abruptly there stood in the air before him, as plainly as if of flesh and blood, an image of the old-young professor of anatomy at the medical school from which Lightbody had graduated—a little, weazened, dried-up ape of a fellow, with glassy, half-conscious eyes, snowy thin hair, and slow and shuffling and shambling and altogether ineffectual steps.

As quickly as it had come, the vision vanished.

Then darted into Dr. Lightbody's mind, as if

from without, an instantaneous resolution which he most unanimously adopted, and which, in all his life, he never broke—never, never again, no never, never, again, never, never, never, under any circumstances whatsoever, to administer to himself another dose of morphine. For the young-old professor had died—like a beautiful flower that had been nipped and shriveled up by the frost—he had died in an insane asylum.

At ten the doctor's throat was stiff, and his lips were frothy.

At eleven he took his temperature, surprising himself to find that he had no fever.

At twelve the operation-fright was on again, and worse than before.

He looked at the needles and the syringe, at the slender tubes of *morphiae sulph.* and *atropiae sulph.*, of each so large—or small—a fraction of a grain. He glanced even at a tube labeled "Cocaine." But he shook his head. Enough, he had seen the vision. He might be a coward in body, but back in his soul he was brave.

At one the doctor unpacked and repacked, for the fortieth time, his operating case.

At two he was at the bedside.

Now all the money that Dr. Lightbody has ever earned in all the successful years that have come to him, and all the money that all of his distinguished confrères had ever earned before that day or have ever earned after it, and even all the money that all the doctors in all these opulent United States of America have earned since the beginning of years in

our land, could never have compensated poor, shivering, shaking, terror-stricken, rabbit-hearted Dr. Lightbody in the next half hour of hell that was his. All the terror of all the doctor's ancestors, arboreal and unarboreal, prearboreal and postarboreal, seemed rolled and caked and hardened and concentrated and thrown at frequent intervals into the center of his fear-racked body, there to explode like a shell and to radiate all over him.

Nevertheless, he was, in outward semblance, preternaturally calm.

The atropine he instilled with trembling fingers, having to separate the eyelids two or three times before he got the medicine between them. The cocaine he was even a trifle worse with. The antiseptics were easier. You used them in quantity, so did not need to be particular.

Finally, a little cocaine again. Then, "Do you feel that, Grandpa?"

"No, I don't feel it."

"All right then, we'll operate."

As he uttered once more the momentous word, he noticed he pronounced it "offahay." He tried to wet his lips with his tongue, only to find that the tongue was the dryest of the three.

Again he said, "All ri', now we'll offahay."

He reached out toward the table for forceps and knife, only to find he had those things already in his fingers. Where *were* his fingers? Oh, yes. He looked once more and saw them. Otherwise he could not have told himself where they were.

Then he discovered he had not yet inserted the speculum.

Stiffly he laid down on the table the knife and the forceps. With hands that felt like lumps of clay, he seized the speculum. Compressing the spring with great force, he let the instrument fly to a far corner of the bed. It rolled down on the floor. It had to be antisepticized again, of course.

Once more he was ready. With shaking fingers, and heart beating little quick strokes like a lady's watch, he compressed the speculum, and this time inserted it.

"Ouch!" remonstrated the patient.

"Be good," said the little doctor, patting the big old man paternally on the cheek. "You have nothing to fear." Of "fear" he made two syllables.

Slowly he took again the awkward forceps and the little stiff ribbon of sunlight attached to the hollow-metal handle; slowly he stooped down over the patient and gazed upon him; slowly he sighed—one long, unconscious sigh of ineffable sadness; reached over—half deaf, half blind, half conscious, in a whirling, cyclonic soul-wreck and howling pandemonium of mortal horror, and then stepped back—so it seemed to him—apart from his material body, behind it say half a foot or so, and began to look on easily and unconcernedly, because his very soul itself was now paralysed and incapable of further feeling. And he saw a very strange performance then—a most remarkable performance. Hands that were his yet not his, fingers that were his yet not his, lifted up the for-

ceps and the flashing bit of sunshine.—Now his own voice spoke. It mumbled away down somewhere, "Though all the devils in hell! Though all the devils in hell!"

A neighbor lady, standing near, protested, "Doctor, why do you swear so?"

The doctor did not hear her.

Still he seemed to himself to be standing just behind his own body watching indifferently the spontaneous operation.

The forceps grasped a fold of conjunctiva. The point of the sunshine stabbed into the anterior chamber gently, just as it should. It shone there clear and lustrous, just as it should. Slowly, the handle of the knife was depressed by those fingers; slowly and unconcernedly, as if of their own volition—so great a thing is habit, so great a thing long study and arduous and painstaking practice—they shoved that lightbeam accurately through the eye. Look at the counter-puncture! Well done!—like machinery. The incision—it goes even better. Bravo!—it is finished. The iris forceps. Closed. Into the chamber. Open. "Though all the devils in hell! though all the devils in hell! though all the devils—" The coloboma is magnificent. "Though all the devils—" The capsule—that's easy. Like a spider's—you don't see the web, but the lens advances. Now a little pressure—a little more—a little—

"Success to you, Dr. Lightbody!" the doctor shouts, still aloud. And as the beautiful yellowish-bluish-white of an opal of a magnificent jewel of a

cataractous lens rolls upwards through the pouting little wound as easily and as accurately as Knapp himself has ever rolled one, the doctor cries out, in his dry-lipped, tired, but still expectant little voice, "Let there be light!"

And those words must indeed have been a prayer. And that prayer the gracious Father must have heard. For, at all events, as the last small bit of cortical matter rolled outward in the track of the opal, lo and behold! there *was* light—light—light—very much light indeed.

And the little doctor was well satisfied. But the money that he got didn't pay him.

V.

TRIALS AT THE TRIAL CASE.

V.

TRIALS AT THE TRIAL CASE.

We country oculists have very many trials, but our trials at the trial case are the most trying trials of them all. That's why we call this lens filled Pandora box a trial case. For one thing, you understand, "the other party" in such trials is not the other party merely and simply and solely; he is also the judge and also the jury. He is, in fact, the court and the witnesses. He is everything. We ourselves are —well, nothing in particular, only the doctor.

Now it begins. He is a big, fat, burly fellow, and his eyes are bothering him. He wants glasses, sees rings around the lamp at night, "regular rainbows," and has pains in his eyes and "up here." "Age?" "Fifty-seven. Yes, I have changed my glasses half a dozen times in half a dozen months. They do all right at first, but then, in a few days, they seem to change and go back on me." I suggest the possibility of the change having been in the eyes rather than in the glasses; but opinions are not so easily changed as either spectacles or eyes.

We don't push the argument, and we find ourselves at the trial case. Hyperopia. High degree. Not much improvement in distant vision even with his highest lenses. Near vision also bad. Presby-

opia far beyond the point at which it should be at this patient's age.

Then the tension—plus two. Cornea steamy and anæsthetic. Ophthalmoscope reveals the expected changes.

"All right, my friend," I say; "you have glaucoma. You should take an operation."

"Why, I only wanted some spectacles, Doc."

"You want what you need, don't you?" I answer.

"Why, yes; of course you know more about it than I do, but I only wanted spectacles."

"You don't need spectacles merely," I say. "You need an operation also. If you do not wish to take the operation, all right; but, without it, you will certainly go blind—eventually."

The fatuous countenance gives the grin of ignorant incredulity. It says more plainly than words, "I believe you are lying."

"Insure the eye?"

"No."

"Why not?"

"May I ask your occupation?"

"Yes. I am a farm hand."

"Work for another man? Do you insure him a crop?"

"Why, no."

"Certainly not. You can promise good work, but you cannot promise a crop. Just so with your eyes. I can perform a good operation, but I cannot promise success. Sometimes the operation is successful, sometimes it is not. An operation is, however, your only hope."

"I can't see why you can't insure my eye."

"Look here. The chief reason why I can't give you insurance is simply that I am not in the insurance business. I am in the doctoring business, and the article I have for sale is medical services. Even were I an insurance company, can you not see that it would be the wildest insanity to insure (even to the extent of the doctor's fee) either a man or an organ that was afflicted with a terrible disease. I know of no company that does not take the very greatest pains to reject just such risks. And yet you ask that I assume them when I am not even in the business, and not only that but to assume them for nothing. The fee that I should ask you, you know, would merely be a reasonable price for the services; I should be getting nothing for the insurance."

The man rises. He fills his great wide chest with the wind of self-importance. "*I* don't need no operation," he says. At the door he pauses. "So you hain't got no glasses that won't change on me, Doc?"

"There are no glasses that change," I answer, "either on or off anyone. Glasses don't change, unless they are put to a wheel and a change is ground on them. But *eyes* change. And yours will change till at last they cannot tell when darkness changes into day."

The man, throwing back his head, laughs a loud "ha ha!" "You can't fool *me,* Doc," he says. "That's all right though; that's the way to get rich."

Though all my logical pearls are certainly wasted, this man is a human being, and a brother; my heart

somewhat aches when I think of the long darkness that will come to him, and of his great stupid floundering mind attempting to entertain itself in that darkness. This, however, is only one of the trials at the trial case. "It's all in the day's work." Next.

A little girl. Her papa with her. Painful eyes and bad lessons. Does she need glasses? Her eyes are red, and I evert the lids. Then I see a case of granulated eyelids in its most terrible form. I show the father, and inform him that this is not a case for glasses. "So-and-so," says he, mentioning the name of a graduate of a six weeks' diploma mill, "cures granulated eyelids with spectacles." "Does he?" I respond. "Then he should not be so modest. He ought to step up and permit the medical profession of all the earth to honor him." But the pearl is trampled. The man and his daughter are gone, to seek the shameless graduate of the shameless mill.

A woman has broken a lens, and wants a new one. Can I furnish one lens only? Oh, most certainly. She has not brought her glasses with her; some day she will return with the glasses, she says. The superfluous visit is ended.

Now enter parents with a cross-eyed boy. His is properly a case for operation, but the parents know best. I tell them the truth about the matter once and yet again. Still they think they know best. Well, drops will do some good. Glasses will do more good. Further, training will do a great deal of good. But the case is too far gone to be entirely curable without operation; and, looking down the future for a year

or two, I see the parents one day in "the city" having an operation. They return triumphantly, and tell how Dr. Shastid tried to cure their son without operation but failed. "Then Dr. So-and-so, of St. Louis, operated, and now the eye is all right. We're so glad we went." And the city oculist is calmly assumed to have exclusive information on the subject of cross eyes.

Two ladies of middle age, one of whom insists that she is a lady indeed, and that she therefore must be examined with unusual care. I promise her great care.

"I knew you would not neglect me, Doctor," says she, as she ignores the chair I offer her, and takes another.

At last I get her in the right chair. After much difficulty I succeed in focusing her attention on the test letters.

"I can only read the top line."

"What! Can't you read any more than that? I'm astonished."

"Oh I can read more, but then I have to look."

"All right; please read, even though you have to look."

"Well, Doctor, it sometimes seems just as if a little scum was growing over my eyes."

"Kindly read, even at the expense of looking."

"I can see the letters, but I can't tell what they mean."

"Oh they don't mean anything. They aren't supposed to make sense. They are just isolated, just separate letters."

"If they don't make sense, what do you have them for?"

"To test eyes with—when I can." I may have sounded just the slightest undertone of expostulation.

"Don't get cross, Doctor. I'm the one that's suffering."

I have my doubts. However, I try to seem delighted with her humor, and I smile my sweetest smile.

Patient suddenly begins reading softly to herself, low down on the card, among the very smallest letters.

I say, "speak a little louder, please. I can't tell whether you are getting the letters right or not."

Patient's patience is thoroughly exhausted. She has borne with me long enough. With a look of infinite scorn, she exclaims, "Well, I know; I know whether I'm getting them right or not. Do for mercy's sake suppose I know my own letters."

"Since when, Madam," say I, with a bit of sleepy irritability (for I sat up late last night with my journals, and then was rousted out early this morning), "did the Roman alphabet cease to belong to all civilization?"

I try to heal the wound instantly with another smile, but am too late. The lady rises, heaves a long sigh, looks about for her wrap, discovers it, goes and gets it. She returns to where I am standing, takes her hat from a chair and goes to another part of the room, where she stands before a mirror for some time adjusting her coiffure and her hat.

I make a pleasant remark or two, but these she ignores.

If she only wouldn't be so slow!

I try to busy myself with the various window curtains of the room.

At last she turns. Not yet, however, to depart. She merely addresses a few remarks in a low toned buzz to her companion. The latter now and then responds in like manner, and also occasionally nods her head.

The two pass out without a word to poor me, though I again attempt to start a conversation.

A few days later, I shall hear from a friend that Mrs. So-and-so consulted me the other day, but that I said I could do nothing.

A lady who does much reading. She is twenty-nine and beautiful. Her eyes, however, are red and constantly weeping, and they give to her the most excruciating and unremitting headaches. I explain about the atropine. It is all right, she says. Shortly, the trouble is found. Now she begins to rebel at the thought of wearing glasses. I start to argue just a little, but suddenly her good sense comes to the rescue, and she accepts the glasses. She will never regret the correction of six dioptries of hypermetropia.

A laborer of 40. He does not see at times as well as he thinks he ought. He wants to know if I can "fit him to a pair of spectacles."

"All right. Can you read those letters yonder?"

"No, Doctor, I cannot."

"What! can you not read even the very largest?"

"No, Doctor, I cannot."

I hand him some near type.

Again he fails to read even the very largest letters.

I make a tiny pass at the gentleman with my closed hand, and he dodges; so I suspect malingering. I am about to submit the "patient" to some special tests for malingering, when, suddenly, I happen to think of something. "Oh! Do you know your letters?"

"No, Doctor, I do not know even a single one of them."

We are all right now—the opthalmoscope. Later, strange as it may seem, I find the man, spite of his gross illiteracy, exceedingly intelligent. He has money in the bank, too, and pays his bill promptly.

Then he spoils the whole matter by stopping to talk. His first few sentences fall agreeably enough, but he runs on and on and on. Suffering patients are in the waiting room, but this man's tongue wags forever. He is really a good talker, and, at another time, I should delight to listen to him. But he lacks the judgment to be terse on this occasion. At last a patient, an old lady who has long since learned the value of "push," thrusts open the door and querulously remarks, "Doctor, I'm the third in line, and if everyone before me takes the time of this un, I'll not get home before to-morry midnight." Then my interesting talker without judgment collapses.

Well, he was rather a satisfactory patient anyway, at all events quite a contrast to the one that follows.

He enters with an air of great anxiety. "I have come," says he, "to ask you to refer me to the best oculist in St. Louis."

I reply that I am an oculist.

"I know, Doctor, but this is for an operation. I need, I fear, an operation."

"But I operate."

"Yes, I know, but this is a serious matter."

The fellow, for such he proves himself to be by his every sentence, even to the last, is finally got rid of. His memory, lingering, forces upon me the disagreeable generalization that all the trials of this long day are matters hardly so much of ignorance as of sheer bad manners. People know enough to do better, if they were only better bred. And I am forced to wonder, too, if matters have always been so, and whether they will indeed be so forever.

In the midst of my wonderings I am interrupted. There is ushered in the last, and by far the most satisfactory, of the spectacle patients of the day.

He is an intelligent farmer, a man truly typical of all that is good and desirable and honest and sensible in this country. Of good healthy brawn, he is of good healthy brain also. But his eyes hurt him. And he likes to read. So he comes to have the trouble righted.

A moment at the case and I see he needs atropine. I explain the necessity, and also the temporary inconveniences that follow the use of that drug.

"Whatever you say," he answers tersely, and with confidence.

An hour later I have his correction.

"How much to pay?"

So much.

He pays it.

A month later he hails me from a distance. "See all right now, Doctor," he says.

And that is all.

Yet I understand him.

And he understands me too. He has helped me, a very little. I have helped him, very much indeed. He knows which side the ledger the balance really lies. And he knows that I know it. He pays me, however, the compliment of not using words unnecessarily. I perceive (quite as well as if he had flung a large library of dictionaries at me to say it) that he does not regard me as a robber, that he knows that I understand my business, that a jeweler or a druggist with six weeks in an optical college does not, that he does not come for impossible insurance of diseased organs, that I am capable of conducting my examinations without advice or suggestion from my patients, that I like a man to be pleasant without at the same time stopping to talk me to death; and I appreciate his intelligence, and I love especially his economy of words. I rejoice, too, in the fact that there are more of him. For he has a wife and a large family; and they are all wise and intelligent like him. I shall never inform him, however, quite how highly I esteem him, for that would spoil the emotion, possibly him also. Yet, nevertheless, to-night, should I happen to be a praying man, I shall probably ask the good Lord to bless this noble gentleman and also all of his kind and kindred in every corner of the world.

VI.

REALIZATION OF DEATH.

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REALIZATION OF DEATH.

Before returning to matters more legal in their character, I may possibly be pardoned for offering the following reminiscence of the time when, as a boy, I used to ride with my father—an old-time country practitioner—over the hills and hollows of Pike County, Illinois.

Once, at a very silent place, while I waited outside at the buggy, it seemed to me that my father was staying in the house a rather unusual length of time. So, strolling idly toward the building, a large and spacious structure, painted—after the fashion of the day—snow white, I stepped unthoughtedly within the door, and—suddenly my heart was frozen. A man, white-faced, black-bearded, in the very flower of his years, lay propped with pillows in a bed; and instinct told me he was dying. So intent was my father in his efforts to revive the man, that he did not notice my entrance. Four or five small children at the side of the bed, their faces pressed in the counterpane, sobbed convulsively. At the head of the bed stood a woman, unquestionably the wife. At a little distance were two or three others, apparently neighbors, weeping. The grief of the wife and mother was something terrible to

behold. She did not seem so much to be shaken with many sobs, as to be held and bound in one vast spasm of woe. Her sorrow was too strong for intermission. But what it was that here most shocked and overwhelmed, was not the sorrow of the spectators, great as that was, but rather the calmness and introspection of the dying man's face, its faint smile and its great solemnity. No outward matters concerned it. Apparently indifferent to the raging griefs about, it seemed turned inward on the deepest memories of long years, calmly and impartially judging them, good and evil.

As soon as I could move, I turned away, and went to the buggy. My father came soon.

I did not tell him what I had seen; and I kept my face averted that he might not know my depression. The terrible philosophy, that day for the first time, was impressed upon me, that man must die. No matter how happy his heart, or how strong his body, he must die. Death, so far at least as this world was concerned, was to be the end of all of us. Die, die, die; that we should all do. The whole great family of man should die. Such things, of course, I had heard very frequently, and I had often seen funerals and all the sad trappings and paraphernalia of woe, and I had even known those who had died—the Patchens, particularly; but now for the first time, or so it seemed, I perceived, as never before, the *meaning* of death, and the sad realization filled up my soul with gloom.

We went that day, to a place not far from the house where the black-bearded man had died, and the mansion of sorrow, from where I waited in the road,

could be distinctly seen, white and large on its lofty hill, shining as a bright monument and warning. It drew my eyes with a growing fascination. Turn as I might, I ever found my gaze reverting to it. "Gone, gone!" it seemed to say to me, "forever gone! Life and love and happiness all gone. What do things matter, what does life amount to?" I turned away, I closed my eyes, I dropped my face in my hands, I ran to the fence across the road and pressed my eyes against that; but in vain. I ever found my gaze turned backward to the house of the dead—to its grief, to its sorrow, to its imperative instruction. Overcome at last by the blackest melancholy, I deliberately faced about and ran along the road. And I ran, and I ran, and I kept on running. And at last I fell. And when I arose, a number of high hills had come between me and the sorrowful sight. "Now," thought I, "I am rid of it." But I was not. For the sadness of death seemed to have followed, and to have spread, and to have covered all the earth, as it were with a sable garment. And I went and leaned weakly against a fence, and looked into a field where, as it was summer, thousands upon tens of thousands of aged stalks of wheat stood bowing, bowing, their grave heads in the pleasant breeze. And, as I looked, it seemed, in my overwrought condition, that the stalks, like me, were sad to distraction, that they had some dim foreknowledge of the sickle, and the time when rain and shine and sweet myriad companionship would cease, when life, which had come upon them so mysteriously, should be as mysteriously taken away. For this reason it was, I

thought, that, all day, all day, they kept bowing, bowing, their grave heads—in reverent and silent acquiescence in fate.

Unable to stand the morbid fancies longer, I once more started away, and attempted to run; when suddenly—

"Hello, are you there?" It was my father, in his buggy, coming down the hill.

How gladly did I not run to him and clamber to his side. And then, as I told him of the death-scene and the mood it had brought to me, how tactfully did he not guide my mind to pleasanter things—at first to matters of consolation, and then afterwards to stories of adventure or topics of history, and so on down to comical tales, to "huge jokes" and "side-splitting puns," till the hills and hollows about us were filled with our joyous laughter. And we kept on laughing for a very long time, 'twixt house and house—till the night came down; and then, as we drove, each through his self-peopled dark, my father sat unmoving and unspeaking, so long, so long, that, at last, like the child that I was, I began to wonder if the night had not become to him what the day had been to me.

VII.

COMPULSORY EXHIBITION IN PERSONAL INJURY CASES.

VII.

COMPULSORY EXHIBITION IN PERSONAL INJURY CASES.

Addressed to both doctors and lawyers, but to the former the more especially.

Not many physicians understand, perhaps, that, in some of the state courts, and also in all the federal courts, the plaintiff in a personal injury suit (to which variety of actions, medical malpractice suits belong) cannot be obliged against his will to exhibit his alleged injuries—either (in proper cases) to the jury, or (when exhibition to the jury would be indecent) to a committee of physicians who should be appointed by the parties or by the court, and who should later proceed to the witness stand and testify.

Please, at the very beginning, to understand the question exactly. It is everywhere admitted that, with certain restrictions, the plaintiff in a personal injury suit may, if he so choose, exhibit his injuries—either, in proper cases, directly to the jury; or, in other instances, indirectly, to physicians, who are afterwards to go upon the stand. But what about cases where the plaintiff does not so choose? What if, when the de-

fendant, or the court itself, suggests that the plaintiff undergo a physical personal inspection, he objects? May the plaintiff, then, when he does so object, be compelled, against his will, to undergo the examination? May the court so compel him?

At the outset, it is to be remarked that no case involving the power in question was decided, either in English or American law, till 1868. At no time in all the centuries from earliest Anglo-Saxon days, in England, and from the beginning of colonization in America,—so far at least as records show,—did the question a single time come up for decision. Indeed, in England, as will appear later, it has not arisen even to the present day. Notwithstanding, however, the fact of the surprisingly late origin of the law on this subject, there were certain very early matters in the English and American law which, though very different, were yet to some extent analogous to the question under discussion, and which might, therefore, be regarded as containing the law upon that question in embryo. However, it is not thought best to consider such matters in this place. They may be found considered rather fully in an article by the present writer published in the "Michigan Law Review," Vol. 1, No. 3, p. 193, entitled "May the Plaintiff in a Personal Injury Suit be Compelled to Exhibit His Injuries? If so, Under What Circumstances?"

It is rather suggestive that the first case involving the right of the defendant in an action for personal injuries to have personal inspection of his adversary, arose in an action for malpractice against a physician—

Lewis Sayre, a surgeon of New York City, who had operated upon an abscess in the hip of a young girl.[14] It was alleged that Dr. Sayre had inadvertently and unnecessarily opened the capsule of the hip joint and that permanent stiffening of the articulation and some deformity of the limb had followed in consequence. The defendant asked for a physical examination of the plaintiff, a proceeding which the plaintiff resisted. The court granted the order. Said Jones, J.:[15]

"I am aware there is no recorded case of an application for any such discovery having been granted; but, at the same time, there is no recorded case of any such application having been denied. It is probable no such application was ever made. The reason why it never was cannot be known, but many may be conjectured. Among them, that people are always timorous of taking the initiative, especially if the step is likely to subject them to large expense, as a suit in chancery would; therefore, a case of urgent, almost absolute, necessity is requisite to set them in motion. It is probable that no cases of sufficient urgency to overcome this timorousness occurred. Again, at the time of the commencement of the action at law, the subject of which inspection is desired may either have been lost, destroyed, used up, or passed out of the control of the party, or have become so changed by natural or artificial causes, as that an inspection would be of no benefit. Again, as a suit in chancery was of considerable duration, the subject would, in all probability, have become so changed from natural causes that an inspection, when ordered, would be of no avail. Again in a large proportion of cases it may have been considered that the benefit to be derived would not be adequate to the expense.

"A motion similar to the present obviates all these ob-

[14] Walsh v. Sayre, 52 Howard Pr., 334 (1868).

[15] I have, wherever it was possible and expedient, permitted the judge to state the law in his own words. I have also in every instance given exact citations, and, when possible, both to the state reports and also to the volumes of the reporter system. Thus no question as to the authority for my statements can arise.

jections, except the second; for the principle being now established it will require but a few days to adjudicate on any particular motion, and the expense is but trifling."

This case, well argued as it is, and important as its holding would seem to be to the cause of justice, is nevertheless not of very great force as an authority. In the first place, the very fact that it stands as the first recorded case upon the question—"a case of first impression," as the phrase goes—very materially lessens its value. Again, the court was not a court of last resort. Thirdly,—by far the most important consideration,—the decision was overruled by later cases both in the general term of the supreme court, and in the court of appeals. In the very next case,[16] indeed, in which the question arose squarely, *Walsh* v. *Sayre* was overruled. Said Learned, J.:—

"The order is so unusual that we may well inquire upon what authority of precedent or principle it rests. For precedent the defendant cites what is called the leading case of Walsh v. Sayre (52 How. Pr., 334). That case was decided by the special term of the superior court of New York, in 1868, and was reported in 1877. The action was for malpractice, and the motion by the defendant was that the plaintiff submit to a personal examination by surgeons.

"The opinion states that there is no recorded case of an application for any such discovery having been granted, and the decision is based upon the analogy to discovery in chancery. We see no analogy whatever between the production of books and papers or the examination of a party by a bill of discovery, and the compelling of a party to expose his person to the inspection of physicians."

Further, in the same case, it is said:—

"It is undoubtedly true that not infrequently plaintiffs suing for bodily injuries, do exhibit in court the injured part. Nor do we know of any reason why they should

[16] Roberts v. Ry., 361 N. Y. Supr., 154, 29 Hun., 154 (1883).

not do this; notwithstanding the exhibition may excite sympathy. And, on the other hand, all unreasonable concealment of any injured part (not justified by any dictate of modesty or otherwise) may excite a doubt in the mind of the jury as to the genuineness or extent of the alleged injury. But we cannot admit the principle that, either in the presence of the jury, or in the presence of a referee, a party can compel his opponent to exhibit his body in order to enable physicians to examine and question and testify.

"Section 834 of the Code, forbidding a physician to testify to information obtained while attending a patient, necessary to enable him to act, is not strictly applicable to the question now under consideration. But if the law will not permit a physician, voluntarily consulted, to reveal what he has learned, can it be that the law will compel a party to reveal, by exposure of the body and by answers to questions, facts to a physician, to which he may afterwards testify in court?

"There may be danger that in actions of this nature plaintiffs will exaggerate the injuries they have received; and that defendants may be at a disadvantage in ascertaining the exact truth. But this evil is far less than the adoption of a system of bodily, and perhaps immodest, examinations, which might deter many, especially women, from ever commencing actions however great the injuries they had sustained."

Next the question arose twice[17] in the superior court of the city of New York, and in both cases the decision was against the existence of the power.

At last the matter came up in a case[18] in the court of appeals.[19] If the question had been in doubt in New York before, this case was decisive. No other question was presented for decision, and a full and exhaustive opinion was written. It was held in the

[17] Neuman v. Third Avenue R. R. Co., 50 N. Y. Super. Ct., 412 (1884); Archer v. Sixth Avenue R. R. Co., 52 N. Y. Super. Ct. 378 (1885).

[18] McQuigan v. Ry., 129 N. Y., 50 (1891).

[19] In New York the court of appeals is a higher court than the supreme court, and is, therefore, the court of last resort.

clearest of language that the power to compel the plaintiff in a suit for personal injuries to submit to a physical examination did not exist. Said Andrews, J.:—

"Upon the organization of our state government, our courts succeeded to the powers theretofore exercised by the courts of law and chancery in England, so far as they were applicable to our situation. *It is a significant fact that not a trace can be found in the decisions of the common law courts of England, either before or since the Revolution, of the exercise of the power to compel a party to a personal action to submit his person to examination at the instance of the other party.*[20] If the power exists it is difficult to suppose that it would not have been frequently invoked. Actions for assault and battery, for injuries arising from negligence, and generally for personal torts, were among the most common known to the law and yet, so far as we can discover, in no case was it supposed or claimed that the court was armed with this jurisdiction. The non-exercise of the power is not conclusive against its existence, but it is strange if the power in question existed, it should have been unused for centuries and never been called into activity."

This reasoning, as will be seen, is precisely the opposite to that of Jones, J., in the case of *Walsh* v. *Sayre*. Which reasoning is the better, it is not necessary here to consider. The law as to the point in question in New York, so far at least as the common law was concerned, was definitely settled.

In 1893, however, the common law was changed by statute,[21] and the principle laid down in *Walsh* v. *Sayre* was made operative. The statute runs:—

[20] This passage is not italicised in the original. It is so treated here because it tends to confirm the statement made near the beginning of this article with regard to the extremely late origin of the law upon the matter under discussion.

[21] Laws of 1893, chap. 721. This statute would seem to be the only one ever passed, dealing expressly with the power in question.

"In every action to recover damages for personal injuries, the court or judge in granting an order for the examination of the plaintiff, before trial, may, if the defendant apply therefor, direct that the plaintiff submit to a physical examination by one or more physicians or surgeons, to be designated by the court or judge, and such examination shall be had and made under such restrictions and directions as to the court or judge shall seem proper. In every action brought to recover damages for personal injuries, where the defendant shall present to the court or judge satisfactory evidence that he is ignorant of the nature and extent of the injuries complained of, the court or judge shall order that such physical examination be made."

In the case of *Lyon* v. *Manhattan Ry. Co.*,[22] this statute was held to be constitutional. One case decided *since* the passage of the statute, but not *under* the statute for the reason that the trial in the lower court took place two years before the statute was passed, affirmed the principle previously supported by the weight of authority in New York.[23]

Thus, much attention has been devoted here to the law in New York because it was in that state that the question arose first and also because it is in that state that the question has arisen most frequently and been most thoroughly discussed. Law on the point, however, has been making in other states.

In Illinois the right is denied. The question first arose, or was said to have arisen, in *Parker* v. *Ens-*

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[22] 142 N. Y. 298 (1894). Other cases arising under this statute: Green v. The Middlesex R. Co., 10 Misc., 473 (1894); Bowe v. Brunnbauer, Super. Buff., 13 Misc., 631 (1895); Moses v. Newburgh Ry. Co., 91 Hun., 278 (1895); Lawrence v. Samuels, 16 Misc., 501 (1896).

[23] Cole v. Fall Brook Coal Co., 53 N. E., 670, 159 N. Y., 59, 87 Hun., 584 (1890).

low.[24] In reality the opinion in this case does not clearly seem to have been necessary to the decision; and, moreover, no authorities whatever are cited. Still further, the opinion is scanty and arbitrary. All that is said, is as follows:—

"Complaint is also made that the court refused to compel appellee to submit his eyes to the examination of a physician in the presence of the jury. There was no error in this. The court had no power to make or enforce such an order."

In the next case touching upon the subject,[25] the question under discussion is not squarely passed upon, but the existence of the power is hinted at in the following terms:—

"As we view the case it seems quite unnecessary for us to express any opinion upon the general question as to whether, under proper circumstances, and where it is shown by satisfactory proof that the due administration of justice requires such action, a court may not have the power to compel a plaintiff, in an action for a personal injury, to submit to such personal examination as may be necessary for the purpose of furnishing reliable and satisfactory evidence of the nature, extent and permanency of the injury complained of."

In *Joliet St. Ry. Co.* v. *Call*[26] the question came up squarely, and was decided in the negative. The force of the opinion, however, is weakened by the fact that the two Illinois cases therein mentioned are cited apparently without knowledge that, in both those cases, the decision of the question was not necessary to the decision of the case. However, in *P. D. & E. Ry. Co.*

[24] 102 Ill., 272 (1882).

[25] St. Louis Bridge Co. v. Miller, 138 Ill., 465 (1891).

[26] 143 Ill., 177 (1892).

v. *Rice*[27] the question again arose squarely and was again decided adversely to the existence of the claimed power. So that the matter may now be regarded as definitely settled in Illinois in the negative. It is worth mentioning that in 1895 the question arose in the Illinois court of appeals;[28] and was, of course, decided in accordance with the precedents established in the supreme court of the state of Illinois.

In Texas, in the supreme court, though the question has been discussed very frequently, and has often only narrowly missed coming up for direct decision, it has never yet[29] been really decided. So, too, in the Texas Civil Appeals, the question has frequently been discussed,[30] without, except in three cases,[31] its having been necessary to the decision. In the two cases in which it was unquestionably necessary to the decision, it was held that the power did not exist. It is not to be doubted that the question, should it ever arise squarely in the supreme court of Texas, would be decided in favor of the plaintiff.

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[27] 144 Ill., 227 (1893).

[28] C. B. & Q. Ry v. Keith, 65 Ill. App., 461 (1895).

[29] I. & G. N. Ry Co. v. Underwood, 64 Texas, 463 (1885); Mo. Pac. Ry. Co. v. Johnson, 72 Texas, 95 (1888); Gulf, Colorado & Sante Fe Ry. Co. v. Norfleet, 78 Texas, 321 (1890); Chicago, Rock Island & Texas Ry. Co. v. Langston, 92 Texas, 709 (1899).

[30] Gulf, C., & S. F. Ry. Co. v. Nelson, 24 S. W., 588, 5 Texas Civ. App., 387 (1893); Houston & T. C. Ry. Co. v. Berling, 37 S. W., 1083, 14 Texas Civ. App., 544 (1896); C. R. I. & T. Ry. Co. v. Langston, 19 Texas Civ. App., 568, 47 S. W., 1027 (1898).

[31] Ft. Worth Ry. Co. v. White, 51 S. W., 855 (1899); Galveston, H. & S. A. Ry. Co. v. Sherwood, 67 S. W., 776 (1902); International & Great Northern R. Co. v. Butcher, 81 S. W., 819 (1904).

In Delaware the question has once arisen,[32] and, in some sense, been decided. In the lower court, it was the plaintiff, at the outset, who wished to exhibit his injuries to the jury, and it was the defendant who objected. At the noon recess, the attorneys for the two parties got together and agreed that the plaintiff should be examined by a physician during the recess. Three physicians, selected by the defendant, then proceeded to examine the plaintiff. Afterwards, when one of these physicians was testifying, the counsel for the defense asked the court to compel the plaintiff to exhibit his leg (the part injured) to the jury; and it now was the plaintiff, in his turn, who objected. The court refused to compel the plaintiff to exhibit. In the higher court all there was of the opinion was this:—

"*Per curiam.*—We think that we have no power to compel the plaintiff to submit to an examination."

Under the circumstances, this case decides but little, perhaps is entirely obiter;[33] and it is here cited merely because it is the only case in which the point in question has ever been even nominally passed upon in the state of Delaware.

In Massachusetts only one case[34] has arisen, and

[32] Mills v. Wilmington City Railway Co., 1 Marvel, 269 (1894).

[33] *Obiter,* i. e., *obiter dictum,* or, a saying by the way. The phrase relates to an opinion which is expressed in a case, but which is not necessary to the decision of it. Such sayings, or by-the-bye opinions, are not binding in subsequent cases, even in the same jurisdiction. They exert, however, at times, what is called "persuasive authority," either in the same jurisdiction, or in another.

[34] Stack v. New York, N. H. & H. R. Co., 177 Mass., 155, 58 N. E., 686 (1900).

in that case it is said (expressly obiter) that the power does not exist. Holmes, C. J.:—

"It will be seen that we put our decision not upon the impolicy of admitting such a power, but on the ground that it would be too great a step of judicial legislation to be justified by the necessities of the case."

Should the question arise squarely in the supreme court of Massachusetts, it would, no doubt, be decided adversely to the defendant.

In Montana the power is held not to exist.[35]

The Federal Courts have held adversely to the power. In *Union Pac. Ry. Co.* v. *Botsford*[36] the question arose first, and the decision was placed upon a ground somewhat different from those upon which the decisions already considered were given. Said Justice Gray:—

"The inviolability of the person is as much invaded by a compulsory stripping and exposure as by a blow. To compel anyone, and especially a woman, to lay bare the body, or to submit it to the touch of a stranger, without lawful authority, is an indignity, an assault and a trespass; and no order or process, commanding such an exposure or submission was ever known to the common law in the administration of justice between individuals, except in a very small number of cases, based upon special reasons, and upon ancient practice, coming down from ruder ages, now mostly obsolete in England, and never, so far as we are aware, introduced into this country."

Speaking of the history of the matter, he says:—

"So far as the books within our reach show, no order to inspect the body of a party in a personal action appears to have been made, or even moved for, in any of the English courts of common law, at any period of their history.

"The most analogous cases in England, that have come under our notice, are two in the Common Bench, in each

[35] May v. Northern Pacific Ry. Co., 81 Pac., 328 (1905).
[36] 141 U. S., 250 (1891).

of which an order for the inspection of a building was asked for in an action for work and labor done thereon, and was refused for want of power in the court to make or enforce it. * * *

"In the English Common Law Procedure Act of 1854, enlarging the powers which the courts had before, and authorizing them, on application of either party, to make an order 'for the inspection by the jury, or by himself, or by his witnesses, of any real or personal property, the inspection of which may be material to the proper determination of the question in dispute,' the omission to mention inspection of the person is significant evidence that no such inspection, without consent, was allowed by the law of England. Taylor on Evidence, 6th ed., Secs. 502-504.

"Even orders for the inspection of documents could not be made by a court of common law, until expressly authorized by statute, except when the document was counted or pleaded on, or might be considered as held in trust for the moving party. Taylor on Evidence, Secs. 1588-1595; 1 Greenleaf on Evidence, Sec. 559."

Justices Brewer and Brown, though citing no precedents, have a well-reasoned dissenting opinion in this case, which somewhat lessens its value as an authority. However, in a case which appears to be the only other ever decided in a federal court, *Ill. Central Ry. Co.* v. *Griffin*,[37] the view of the majority in *Union Pacific Ry. Co.* v. *Botsford* is followed.

In Oklahoma it has been held that the power does not exist, the reason given being that territorial courts are bound by the decisions of the Supreme Court of the United States.[38]

So much for the courts holding that the power does not exist. When we turn to the courts which hold that it does exist, we find the authorities possibly more numerous, but not encouragingly so.

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[37] 53 U. S. Appeals, 22 (1897).

[38] City of Kingfisher v. Altizer, 74 Pac., 107 (1903).

It is chiefly in the West and South that the power is upheld—in Ohio, Alabama, Georgia, Kentucky, Missouri, Kansas, Arkansas, Michigan, Indiana, Wisconsin, Minnesota, Iowa and Washington.

In Ohio, the power has been sustained, five propositions being laid down governing its exercise.[39]

In Alabama, too, the power has been sustained, five propositions being again laid down governing its exercise.[40]

In Michigan, also, one case in point has arisen. In that case the power was sustained.[41]

In Indiana, it was long held that the power did not exist. In the first two cases, [42] the opinion, as to the point in question, is entirely obiter. The opinion in the first case,[43] that bears directly on the matter before us, is so brief and to the point that it is here quoted *in extenso*. Coffey, C. J.:—

"There is no statute in this state conferring upon the circuit court the power to make such an order as was asked in this case. If such power exists, it is a power that inheres in the court, independent of any statutory provision. It is applicable alike to all, male and female, and is confined to an examination of no particular part of the person. To say that the power rests in the sound discretion of the court does not meet the case, for the real question is as to whether the power exists at all. So far as we know, the courts of this State have never attempted to exercise such a power, and we are of the opinion that no such

[39] Miami & Montgomery Turnpike Co. v. Baily, 37 Ohio St., 104 (1881).

[40] Ala. Grt. Southern Ry. Co. v. Hill, 90 Ala., 71 (1889).

[41] Graves v. City of Battle Creek, 95 Mich., 266 (1893).

[42] Hess v. Lowrey, 122 Ind., 225, 23 N. E., 126; Railroad Co. v. Brunker, 128 Ind., 542, 26 N. E., 178.

[43] The Pennsylvania Co. v. Newmeyer, 129 Ind., 401 (1891).

power is inherent in the courts. We think the better reason is against the existence of such a right, and, in the absence of some statute upon the subject, we do not think the courts should attempt to compel litigants, against their will, to submit their persons to the examination of strangers, for the purpose of furnishing evidence to be used on the trial of a cause. Should a litigant willingly submit, there could be no legal objection to such an examination, and should he refuse to submit to a reasonable examination, his conduct might possibly be proper matter for comment. But this is quite a different matter from compelling him, against his will, to submit his person to the examination of strangers."

In the most recent Indiana case,[44] however, *Pennsylvania Co.* v. *Newmeyer* is distinctly overruled, the question being squarely before the court, and the court expressly following *Graves* v. *City of Battle Creek*,[45] and the dissenting opinion in *Union Pacific Ry.* v. *Botsford*.[46] Said Hadley, J.:—

"Upon further, and perhaps fuller, consideration of the question, we are satisfied that the decision in the Newmeyer case, upon this point, is refuted by the great weight of authority, and it is therefore disapproved."

In another Indiana case, *The Cleveland, C. C. & St. L. Ry. Co.* v. *Huddlestone*,[47] a question arose which, though it is not precisely the one under discussion, is yet so nearly akin to it, and so particularly liable to be mistaken for it, that the case must assuredly have much interest in this connection. A train, leaping from a track, ran into a telegraph office and injured an operator, dislocating one of his kidneys and pro-

[44] City of South Bend v. Turner, 60 N. E., 271, 156 Ind., 418 (1901).

[45] Cited *ante*, 95 Mich., 266, 54 N. W., 757.

[46] Cited *ante*, 141 U. S., 250 (1891).

[47] 46 N. E., 678 (1897).

ducing, as was claimed, "the secreting of albumen and sugar in the urine." A motion was made that the court order the plaintiff to produce, at or in advance of trial, specimens of his urine for analysis and examination. The lower court overruled the motion. The upper court held the ruling error. Said Howard, J.:—

> "The ruling of the court, it seems, was based upon decisions of this and other courts denying the right of a court to subject a party to an examination of his person for the purpose of enabling the adverse party to secure desired evidence. Such an examination is held to be an invasion of the right of the person—an indignity to which, in the absence of a positive statute, no one should be subjected to against his will. * * * But urine which has passed from the body is no part of the person. It is a lifeless substance, separated forever from the individual, and it can be no more indignity to his person, to subject such substance to examination and analysis, than it would be to require a like examination of the cast-off clothing of the same individual."

In Kansas, the question has arisen twice. In *Atchison, Topeka & Santa Fe Rd. Co.* v. *Thul,*[48] Valentine, J., said:—

> "As before stated, we think the court below, in refusing to make any order in the present case, did so solely upon the grounds that such a practice is unknown to the law, and that the court had no power to enforce such an order. In this we think the court below was mistaken."

This case cites, very approvingly and very fully, the leading case of *Shroeder* v. *C. R. I. & P. Ry. Co.,* to be discussed later and at some length among the Iowa cases.

In *Southern Kansas Ry. Co.* v. *Michaels,*[49] the existence of the power was taken for granted; though,

[48] 29 Kans., 466 (1883).

[49] 57 Kans., 474 (1896).

for reasons appearing in the special case, permission to exercise the power was withheld.

In the Minnesota reports occur three cases. The first, *Hatfield* v. *St. Paul & Duluth Ry. Co.*,[50] was somewhat peculiar. The court was requested by the defendant's attorney to direct the plaintiff to walk across the court-room in the presence of the jury, in order that they might be better able to determine the extent of her alleged lameness and limping. The court declined to do this, and the defendant excepted. Said Mitchell, J.:—

"In an action for personal injuries the court has the power in a proper case, and under proper circumstances, to require the plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of the injuries."

The judge placed his decision on the ground of analogy with actions in other branches of the law—inspection of real estate and personal property, and of allowing tests to be made before the court in patent and equity cases. He adverts to the "common practice" of allowing "plaintiffs in actions for personal injuries to exhibit to the jury their wounds in order to show their extent, or to enable a surgeon to demonstrate their nature and character." Such practice, he says, having been held proper, it should certainly also be held proper to permit the inspection by the jury of a physical act performed by the plaintiff at the instance and suggestion of the defendant.

In *Wanek* v. *City of Winona*,[51] the facts are so

[50] 33 Minn., 130 (1885).
[51] 80 N. W., 851, 78 Minn., 98 (1899).

typical, the position taken is so decided, and the opinion is so well reasoned that the case is here quoted from largely. Mitchell, J.:—

"The trial court denied the application upon the grounds, as shown by his memorandum: First, that he had no power in any case to order a party to submit to a physical examination of his person; and, second, even if he had the power, he would, in the exercise of his discretion, have refused, under the circumstances of the case, to grant defendant's application.

"1. We are very clearly of the opinion that the court has the power, in a case of this kind, to order the plaintiff to submit to a physical examination of his person. We shall not go into any extended discussion of a question which has been so much and so often discussed by courts and text-writers. Upon both principle and reason we are of opinion that in a civil action for physical injuries, where the plaintiff tenders an issue as to his physical condition, and appeals to the court of justice for redress, it is within the power of the trial court, in the exercise of a sound discretion, in proper cases, upon application reasonably made, under proper safeguards designed to preserve the rights of both parties, to order such an inspection, and to require the plaintiff to submit to it under the penalty of having his action dismissed in case he refuses to do so. We are aware that there are some eminent authorities to the contrary, but with all due deference to them, we cannot avoid thinking that they base their conclusions upon a fallacious and somewhat sentimental line of argument as to the inviolability and sacredness of a man's person, and his right to its possession and control, free from all restraint or interference of others. This, rightly understood, is all true, but his right to the possession and control of his person is no more sacred than the cause of justice. When a person appeals to the State for justice, tendering an issue as to his own physical condition, he impliedly consents in advance to the doing justice to the other party, and to make any disclosure which is necessary to be made in order that justice may be done. No one claims that he can be compelled to submit to such an examination, but he must either submit to it, or have his action dismissed. Any other rule in these personal injury cases would often result in an entire denial of justice to the defendant, and leave him wholly at the mercy of the plaintiff's witnesses. In very many cases the actual nature and extent of the injuries can only

be ascertained by a physical examination of the person of the injured party. Such actions were formerly very infrequent, but of late years they constitute one of the largest branches of legal industry, and are not infrequently attempted to be sustained by malingering on the part of the plaintiff, false testimony, or the very unreliable speculations of so-called 'medical experts.' To allow the plaintiff in such cases, if he sees fit to display his injuries to the jury, to call in as many friendly physicians as he pleases, and have them examine his person, and then produce them as expert witnesses on the trial, but at the same time to deny to the defendant the right in any case to have a physical examination of plaintiff's person, and leave him wholly at the mercy of such witnesses as the plaintiff sees fit to call, constitutes a denial of justice, too gross, in our judgment, to be tolerated for one moment."

In *Wittenberg* v. *Onsgard,*[52] an order for further examination of the plaintiff by means of X-rays, *after the physician who had used the rays had burned the plaintiff's neck with them,* was denied, but the power to order physical examination in general was not denied. It was only the order for further examination under the peculiar circumstances.

In Wisconsin there are two cases. In *O'Brien* v. *City of Lacrosse,*[53] the power, though its exercise was refused under the peculiar circumstances, much as in the Minnesota case last cited, was nevertheless assumed to exist.

In *White* v. *Milwaukee City Ry. Co.,*[54] the naked question of the power itself arose, and the power was sustained. Said Lyon, J.:—

"The testimony of the plaintiff and some of her witnesses tends to show that at the time of the trial she had not recovered from the effects of her injuries; that her

[52] 81 N. W., 14, 78 Minn., 342 (1899).
[53] 75 N. W., 81, 99 Wis., 421 (1898).
[54] 61 Wis., 536 (1884).

limb was not then in a normal condition; and that the effect of such injuries would, or might be, permanent. She testified that five physicians had examined her limb, among whom was Dr. Hare. During the trial, counsel for the defendant made the following request, and the following proceedings were thereupon had: *Defendant's Counsel*: 'We ask of the court to direct the plaintiff, who is now present, to submit her limb for examination in a private room attached to this courtroom, privately, to Drs. Senn and Hare, who are now present, and that if she wish she can be accompanied by any of her own female friends who are present, or any other physician whom she chooses.' *Court:* 'I do not see anything improper in the request, but I do not think I have the authority to compel a suitor to submit, in a case of this kind, to any examination against his or her will. I therefore refuse the application.' Defendant excepts. Plaintiff's counsel says: 'The plaintiff herself declines to have the examination in the absence of her physician, who, as her attorney is informed and believes, has left the city since he had been on the witness stand.'

"It will be seen that the court denied this request on the sole ground that he had no authority to compel the plaintiff to an examination against her will. On principle and authority we are satisfied that this was error. . . .

"It is said by the learned counsel for the plaintiff, that it rests in the sound discretion of the court to order, or refuse, an examination. Perhaps it does. But that discretion has not been exercised here. The court expressly denied the application because of alleged want of power to grant it. We hold that in a proper case the court has power to order an examination, and that this is a proper case in which to exercise it."

In Nebraska the question has never arisen squarely. It has, however, been discussed obiter three times.[55] In all these discussions the power was held, or asserted, to exist.

In Kentucky the power was asserted to exist, on the ground that it was implied by the "best evidence"

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[55] Ry. v. Finlayson, 16 Neb., 578 (1884); Stuart v. Havens, 17 Neb., 11 (1885); City of Chadron v. Glover, 43 Neb. 732 (1895).

rule;[56] but the force of this case as an authority is much weakened by the fact that the holding of the lower court was affirmed "on the ground that there was no real dispute about the ankle." In the next Kentucky case,[57] however, the question of the power was squarely before the court, and the power was very clearly upheld.

In Georgia the power was sustained because of a provision of the Code to the effect that "every court has power . . . to control in furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, in every matter appertaining thereto." [58] This case is the only one in any state upholding the power under a statute not dealing in terms with it.

In Missouri, the first case arose in the court of appeals.[59] In that case the power was held to exist. In the next case, *Loyd* v. *Hannibal & St. Joseph Ry. Co.*,[60] the opposite was held. Said Napton, J.:—

"The proposal to the court to call in two surgeons and have the plaintiff examined during the progress of the trial, as to the extent of her injuries, is unknown to our practice and to the law."

In *Shepard* v. *Missouri Pacific Ry. Co.*,[61] however, the opinion in *Loyd* v. *Hannibal and St. Joseph Ry. Co.* is disapproved. In *Sidekum* v. *Wabash Ry.*,[62] the

[56] Belt Elect. L. Co. v. Allen, 44 S. W., 89 (1898).
[57] Louisville & N. R. Co. v. Simpson, 64 S. W., 733 (1901).
[58] Richmond, etc., Ry. v. Childress, 82 Ga., 719 (1889).
[59] 2 Mo. Appeals Rep'r., 1019.
[60] 53 Mo., 509 (1873).
[61] 85 Mo., 629 (1885).
[62] 93 Mo., 400 (1887).

power is assumed to exist, and again in *Owens* v. *Kansas City Rd. Co.*[63] In *Norton* v. *St. Louis & Hannibal. Ry. Co.*,[64] the power is sustained obiter. In *Fullerton* v. *Fordyce*,[65] the existence of the power is again assumed. Last, and most important of all the Missouri cases, is *Haynes* v. *Trenton*.[66] The particular value of this case arises both from the fact that the question was unmistakably necessary to the decision of the case, and from the further fact that the circumstances under which the question arose in the lower court were such as to make, logically speaking, against the existence of the claimed power. This exercise of the power, sustained by the higher court under such circumstances, makes the law unquestionably settled in Missouri. What these facts were will appear by the following extract from the opinion. Macfarlane, J.:—

"After plaintiff had shown his leg to the jury on this trial, and evidence had been offered tending to prove that the injuries were greater than they appeared on the former trial to have been, defendant, as a part of his cross-examination of plaintiff, asked that the physicians, who had previously examined the leg, might be permitted to make a further examination and give their opinion as to its condition, as compared with that when previously examined. This request the court refused, and in doing so we think it committed reversible error."

Hence, it would seem that, in Missouri, the court not only has power, under proper circumstances, to compel the plaintiff to submit to a physical examination, but that it also has power, when at a second trial

[63] 95 Mo., 169 (1888).
[64] 40 Mo., Appeals, 642 (1890).
[65] 121 Mo., 1 (1893).
[66] 123 Mo., 326 (1894).

it is claimed that the injuries had become greater, to order a physical examination for the purpose of ascertaining the nature and extent of the increase.

In Arkansas the matter is clearly settled by *Sibley* v. *Smith*,[67] the decision of the question having been undoubtedly necessary to the decision of the case, the opinion being well reasoned, and several cases from other states having been cited.

In *Railway Co.* v. *Dobbins*,[68] the power is taken for granted.

In Iowa the power has been upheld in two strong cases. The first, *Schroeder* v. *C. R. I. & P. Ry.*,[69] already referred to, was decided in 1877—a rather early date considering that the first decided case on the subject, in any jurisdiction, was in 1868. As this case has been frequently cited in later cases, and has apparently had much to do with the formation of law upon the subject, the privilege is here taken of going into it in some detail. An employe of the railway alleged that, by the negligence of the defendant, he was thrown from a car, a load of lumber immediately afterward falling upon him. He alleged further that his hip and back were the seats of great pain, that the injuries had impaired his nervous system, and that his legs and various internal organs were more or less paralyzed. The defendant asked for an order requiring an examination by physicians who were to be selected in equal numbers by the plaintiff and the defendant; the defend-

[67] 46 Ark., 275 (1885).
[68] 60 Ark., 481 (1895).
[69] 47 Ia., 375.

ant's own medical officer to be one of the examiners, and the expenses to be paid by the defendant. The application was resisted and overruled. This decision was reversed in the supreme court.

Said Beck, J.:—

"Whoever is a party in an action in a court, whether a natural person or a corporation, has a right to demand therein the administration of exact justice. This right can only be secured and fully respected by obtaining the exact and full truth touching all matters in issue in the action. . . . . It is true, indeed, that on account of the imperfections incident to human nature, perfect truth may not always be attained, and it is well understood that exact justice cannot, because of the inability of courts to obtain truth in entire fullness, be always administered. . . . . Great progress, however, in a comparatively recent period has been made, by legislation and judicial decisions, in the work of conforming the system of evidence to this germinal principle. The most notable of the steps in this progress is the abrogation of the rule which precluded parties to actions from giving testimony therein. . . . The plaintiff, as it were, had under his own control testimony which would have revealed the truth more clearly than any other that could have been introduced. The cause of truth, the right administration of the law, demand that he should have produced it. . . .

"But it is urged that the court was clothed with no power to enforce obedience of plaintiff, had such an order been made. Its power, in our judgment, was amply sufficient to coerce obedience. The plaintiff would have been ordered by the court, by submitting his person to examination, to permit the introduction of testimony in the case. His refusal would have been an impediment to the administration of justice, and a contempt of the court's authority. He would have been subject to punishment as a recusant witness who refused to answer proper questions propounded to him. Should such recusancy too long delay the court, or prove an effective obstruction to the progress of the case, the court could have stricken from the pleadings all the allegations as to permanent injury, and withdrawn from the jury that part of the case. The plaintiff by voluntarily withdrawing his claim for such injury would have been relieved from the necessity of submitting to the examination, and proceedings as for contempt would have been suspended.

When it is remembered that plaintiff was a witness before the court, that the examination of his person would have had the effect to elicit testimony from him, as upon a cross-examination, the power of the court over him will be readily understood.

"It is said that the examination would have subjected him to danger of his life, pain of body and indignity to his person. The reply to this is that it should not, and the court should have been careful to so order and direct. Under the explicit directions of the court, the physicians should have been restrained from imperiling, in any degree, the life or health of the plaintiff. * * * *

"It is the practice of the courts of this state, sanctioned by more than one decision of this court, to permit plaintiffs who sue for personal injuries to exhibit to the jury their wounds or injured limbs, in order to show the extent of their disability or suffering. If, for this purpose, the plaintiff may exhibit his injuries, we see no reason why he may not, in a proper case and under proper circumstances, be required to do the same thing for a like purpose upon the request of the other party. If he may be required to exhibit his body to the jury, he ought to be required to submit it to examination of competent professional men.

"The court instructed the jury that they were authorized to regard plaintiff's refusal to submit to an examination as an admission that the examination, if made, would have been against his interest in the suit. It is argued that this familiar rule of law would alone relieve defendant from the effect of prejudice on account of the refusal of plaintiff to be examined. This position is not correct. The defendant is left to depend upon the inference of the jury, which might or might not have been exercised, instead of having the truth disclosed by direct and positive evidence. The law will not require it to depend upon such inferences where it can afford the means of producing competent evidence upon the question in issue."

In another Iowa case, *Hall* v. *Incorporated Town of Manson*,[70] not only was the question squarely before the court and squarely decided, but a somewhat peculiar phase of the question was presented. Doctors for each side had testified, and disagreed, as to the

[70] 68 N. W., 922 (1896).

mere measurements of an injured foot and ankle. The defendant insisted that the parts be measured before the jury. The plaintiff did not object, but the court overruled the application on its own motion. The supreme court, however, held that the measurement should have been made.

Each of the cases thus far cited on either side of the question, has been individually commented upon at the time when cited; yet nevertheless it may not be improper, at the present point, to attempt to balance the two groups into which the cases fall, and so to come to some conclusion as to the weight of authority in the country as a whole. Indubitably opposed to the power, are found the courts of New York, of Montana, and of Illinois. In Texas, the supreme court has never squarely decided the question, the only recorded cases in which the question has arisen in that state as necessary to the decision having been in the court of appeals; yet we feel that we fully understand just how a decision would run should it come from the supreme court of Texas in a case where the decision of this question was squarely necessary to a decision of the case. Massachusetts would undoubtedly deny the existence of the power. In the federal courts the supreme court has one case denying the power, with two judges dissenting; the circuit court of appeals one case denying it with no judges dissenting. The territorial courts follow the supreme court of the United States. Allowing, now, upon the one hand, the great weight properly to be accorded to the authority of the New York courts, and, upon the other, a proper deduction for the fact

that, in New York, the whole matter has recently been reversed by legislation, it would seem hardly to be denied that the weight of authorities against the power is not really so great as that in favor of it. Nevertheless, there do exist states in which the power is denied, and the federal courts are with them. Moreover, the states in which no law on this subject has yet been made may follow, as they may choose, either the one variety of precedent or the other.

What is the conclusion of the whole matter? Why this. Each one of you, my professional brethren, who practises in Illinois, or in Texas, or in Delaware, or in Montana, or in Massachusetts, or, no matter where he practises, if he be sued in one of the federal courts,[71] is liable, like any other doctor in any other place, to find himself some day the defendant in a suit for malpractice. Then, no matter how false the accusation, how greatly the success of the suit would diminish his fortune, and that which is perhaps far dearer to him than his fortune—his reputation, and no matter how clearly an exhibition of the plaintiff's alleged injuries would demonstrate the falsity of the plaintiff's charge —no matter, I say, for all these things, each one of you, my hard-working, little-collecting brothers—will simply be obliged to take his chances on being able to convince the jury that the plaintiff's alleged reason for not exhibiting his alleged injuries is a bad one.

[71] The suit may be brought in a federal circuit court whenever the plaintiff and the defendant are citizens of different states and the amount involved is greater than two thousand dollars.

Do you think *you* could so convince them? Perhaps you could, and perhaps you could not. Some doctors have tried, and have found that they could not.

The great disgrace of the whole matter is the detestable so-called reasoning on which this extreme injustice to the medical profession is based. In a day when people are shocked and outraged when they hear of an occasional person who will *not* submit to a physician's examination in order to secure relief from disease; in a day, furthermore, when men and women indifferently and to the number of millions yearly, take physical examinations of the utmost completeness in order to qualify for life-insurance, or for the army, or for the navy, or for pensions—in such a day, I say, when such things are done, we are told by some of the learned justices and chief justices of the supreme judicial bodies of our states, and of all of those of the United States, that "the court must positively refuse" to compel the plaintiff in a malpractice suit either to expose the alleged mistreated part or else to give up his case, and the reason which the justices hold out to us therefor is—delicacy.

The plaintiff complains that he cannot bend his elbow. There he sits in court, with his arm straight out by his side. He is a malingerer, and the doctor's reputation is trembling in the balance; yet he who is most interested in the matter cannot get one word from the judge to cause that man to try to bend that elbow, or to let a member of the jury, even ever so gently, to attempt to bend it for him.

The plaintiff, on *his* part, may, if he like, display

injuries of the most frightful character, and, however he came to receive them, he may testify, if he will, that he received them from his physician; but the physician, on *his* part (with everything to lose) cannot so much as compel that plaintiff to attempt to crook that elbow. "The sanctity of the patient's person the law will respect."

Let us look at the matter in still another way. A patient comes and exhibits to his physician, a part of the body for treatment; yet, when the treatment is over, and a suit is brought, and the physician's name and possibly his entire fortune, are at stake, that very same patient will not exhibit that very same part of his body to another member of the same profession in order to determine the actual, the real, the absolute truth or falsity of the identical issue that he himself has raised. "Oh, no, no. No, indeed," says he. "Expose *that* part of my body! Oh, no, indeed! not *that* part. I could not even think of such a thing."

"Correct," affirms the judge. "Adhere to your position." So the defendant is relegated to an argument instead of being permitted his demonstration.

After the trial, the doctor perhaps sells his property. Then he pays a large debt he does not really owe; borrows a little money from a faithful friend, and bids adieu to the place in which he has given five dollars' worth of benefit for every fifty cents in money he has received, and in which his name is possibly blasted forever.

I have no wish to disparage the law, nor to derogate from the dignity of a truly learned and often very

much undervalued profession. Lawyers are, in the main, a set of hard-working, self-respecting, and undercompensated beings, just as are doctors. Nevertheless, there exist bad laws; and this law against the compulsory exhibition of personal injuries is undoubtedly one of such.

The remedy? Perfectly simple. Legislation. Here is a case where legislation is really a remedy. As I have already stated, legislation has actually been tried in New York, and it has there been found effective. Let every state medical society, then, of the states that either refuse to the defendant in a personal injury suit the power in question, or else have not as yet made any law at all upon the subject, appoint an able and active committee to deal with the matter thoroughly and promptly—to copy, if they think best—considering the peculiarities of the constitution of their particular state—the New York statute literally—for that statue has, as I have said, been tried and been found by no means wanting—and to see that the next "session laws" of their own state shall contain either that same identical statute or its actually effective equivalent. Let our brethren of the legal profession who are members of the various state legislatures, stand by us. There is no other way to deal with the matter than by legislation, and that way is really easy. A few hours time.

VIII.

CIRCUMSTANCES UNDER WHICH COMPULSORY EXHIBITION WILL BE ORDERED.

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In a recent number of the "Journal" I discussed in a rather comprehensive way, but yet, as it seemed to me, without unnecessary detail, a matter that ought to be quite close to the heart (and bank account) of every thinking and not altogether impecunious physician—the question, namely, as to whether, in the class of actions called personal injury actions (to which class, of course, belong malpractice suits) the defendant could require the plaintiff to exhibit the part which he alleges the physician has injured, either (under proper circumstances) to the jury, or else (where exhibition to the jury would be indecent) to a committee of physicians selected jointly by the parties or appointed independently by the court. And I showed that, in an alarmingly large number of states the common law (judicial decisions) was settled that the defendant could not thus compel the plaintiff, and, further, that, in an even larger number of states there exists no law upon this point at all, and that, hence, should a case involving the question arise in one of such states, the deciding body might possibly follow the precedents which the states refusing the power had established rather than the rule laid down by the courts which uphold that power.

There are, however, as we saw, states which do really uphold the power in question—courts, that is, which admit that they hold the power, in cases of personal injury, to compel the plaintiff to exhibit the part which he alleges that the defendant has injured. And it has seemed to me that the physicians of such states might care to understand that, even in those states, it is under certain circumstances only that the power to compel an exhibit is upheld, and also to understand just what such circumstances are.

I shall deal with the matter briefly.

First, it is to be observed that, in the investigation of this latter subject, no account need be taken of the courts in which it has been definitely decided that the power does not exist. Nor need account be taken of the courts of New York; for though, in that state, as already mentioned, the judge-made law, which was opposed to the existence of the power, has been overruled by legislation, yet it has seemed best not to attempt in this article a consideration of the cases arising under the statute. On the other hand, account must be taken of a court or two in which, though the existence of the power has never been passed upon, yet the circumstances under which the power may be exercised have nevertheless been adjudicated, the existence of the power having been assumed.

Perhaps the most important question which suggests itself in connection with the present division of the general subject is, whether or not the authority to order personal inspection is one the exercise of which may be required; or whether, upon the contrary, it is

one the exercise of which depends upon the judge's discretion. It seems to be definitely settled that the authority is one the exercise of which depends upon the sound discretion of the trial court; in other words, that it is an official power in the judge, rather than a personal right in the defendant.

In Georgia it is declared that the matter lies in the sound discretion of the trial judge.[73]

In Alabama:—

" . . . the defendant had no absolute right to have an order made to that end and executed, but the motion therefor is addressed to the sound discretion of the court."[74]

In Minnesota it is said:—

"In an action for personal injuries the court has the power in a proper case, and under proper circumstances, to require the plaintiff to perform a physical act in the presence of the jury that will show the nature and extent of the injuries. But the propriety of doing so rests largely in the discretion of the trial court."[75]

In another case the words are:—

". . . it is within the power of the trial court, in the exercise of a sound discretion. . . ."[76]

In Missouri the matter has been decided frequently.

In *Hill* v. *City of Sedalia*[77] it is said:—

"To order plaintiff in a personal injury case to submit to a personal examination by medical experts is within the sound discretion of the trial court."

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[73] Savannah, F. & W. Ry. Co. v. Wainright, 25 S. E., 622, 99 Ga., 255 (1896).

[74] Ala. Grt. Southern R. R. Co. v. Hill, 90 Ala., 71 (1889).

[75] Hatfield v. St. Paul & Duluth R. R. Co., 33 Minn., 130 (1885).

[76] Wanek v. City of Winona, 80 N. W., 851, 78 Minn., 98 (1899).

[77] 2 Mo. Appeals Rep'r 1019 (1884).

In another Missouri case [78] we read:—

"There are respectable authorities which hold that the court may order such personal examination. There are others to the contrary. We are inclined to hold with the former, but not that a party has an absolute right to have such a personal examination. It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused."

The same rule is given in still another Missouri case, *Sidekum* v. *Wabash Ry. Co.*[79] Practically the same thing is stated, but with a certain definiteness in one regard that appears nowhere else, in still another:—[80]

"It was in substance held in Shepard v. Railroad, 85 Mo., 629, that the defendant has no absolute right to have a personal examination; that it is a matter in which the court has a discretion, the exercise of which will not be interfered with, unless manifestly abused. Of course the court was not bound to refuse, or to grant the motion, to the full extent of the prayer. Its order may be moulded to suit the circumstances of the case."

And the general rule is again laid down in the latest Missouri cases of *Fullerton* v. *Fordyce,*[81] and *Paul* v. *Omaha & St. L. Ry. Co.*[82]

One Michigan case [83] speaks of the latitude of the discretion:—

"A wide discretion is vested in the trial court."

Another [84] simply declares the matter to be in the discretion of the trial court.

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[78] Shepard v. Mo. Pac. Ry. Co., 85 Mo., 629 (1885).
[79] 93 Mo., 400 (1887).
[80] Owens v. Kansas City, St. Jo. & Council Bluffs R. R. Co., 95 Mo., 169 (1888).
[81] 121 Mo., 1 (1894).
[82] 82 Mo. App., 500 (1900).
[83] Graves v. City of Battle Creek, 95 Mich., 266 (1893).
[84] Strudgeon v. Village of Sand Beach, 107 Mich., 496 (1895).

In Kentucky it is laid down obiter:—[85]

". . . that the defendant has no absolute right to have an order made to that end, but that a motion therefor is addressed to the sound discretion of the court."

In Arkansas [86] it is said that:—

"In refusing to order the examination, as it may do when the evidence of experts is already available, the circuit court must exercise a sound discretion; and its action is subject to review in case of abuse."

Another Arkansas case [87] also lays down the general rule.

In Wisconsin, too, the general rule is established.[88]

And in Kansas.[89]

Thus it will be seen that the courts are wholly unanimous in deciding that the authority to order physical personal inspection of a plaintiff in a suit for personal injuries, is one the exercise of which rests in the sound discretion of the trial judge; and that the defendant by no means has any right to demand that the judge exercise such authority whether the judge will or no. The opinions differ merely as to the degree of definiteness, or specificality, with which the rule is expressed; no further.

It will be apparent, upon a thought, that, since the power under discussion thus rests in the sound discretion of the trial court, all other questions under the present head resolve themselves simply into inquiries

[85] Belt Electric Line Co. v. Allen, 44 S. W., 89, 102 Ky., 551 (1898).
[86] Sibley v. Smith, 46 Ark., 275 (1885).
[87] Railway Co. v. Dobbins, 60 Ark., 481 (1895).
[88] O'Brien v. City of LaCrosse, 75 N. W., 81, 99 Wis., 421 (1898).
[89] City of Ottawa v. Gilliland, 65 Pac. Rep., 252 (1901).

concerning the limitations upon the freedom with which a court may exercise its "discretion." How discreet must the court be? When will the "discretion" in which the exercise of the power is thus unanimously declared to rest, be adjudged by a court of review to have been sound, and when unsound? Decisions on these points are not wanting.

But, first, is the discretion of the trial judge reviewable? The courts of appeal have almost invariably held that it is, and by the strongest of implications—namely, by themselves reviewing it. The principle has, moreover, also been laid down expressly. Said O'Rear, J., in *Louisville & N. R. Co.* v. *Simpson*:—[90]

"The ordering of such an examination is within the sound discretion of the trial judge, but such discretion is reviewable on appeal."

An Arkansas case[91] is to the same effect.

But *Shepard* v. *Missouri Pacific Ry. Co.*:—[92]

"It is a matter in which the court has a discretion which will not be interfered with unless manifestly abused."

Under what circumstances, then, will the discretion of the trial court be regarded as having been abused?

One of the most interesting cases relating to the abuse of the power to order the examination, is the Kentucky case of *South Covington St. Railway Co.* v. *Stroh*.[93] Here the order was granted, and physicians were appointed by the court to make the examination. But before the examination had been made, the de-

[90] 64 S. W., 733 (1901).
[91] Sibley v. Smith, 46 Ark., 275 (1885).
[92] 85 Mo., 629 (1885).
[93] 66 S. W., 177 (1902).

fendant withdrew its request. The court, then, against the objection of both parties, proceeded to cause the examination to be made and the physicians to testify. It was held that the trial court exceeded its power. This seems to be the only case in which the precise point involved has ever arisen.

Another interesting question, and one on which the authorities are plentiful, relates to the time when the examination may be made. It is generally held that the trial judge has committed no abuse of his discretion, by refusing to order the examination at the time of the trial. In the Michigan case of *Strudgeon* v. *Village of Sand Beach*,[94] a refusal to require the plaintiff to submit to an examination of an injured arm in open court was sustained. True, it was necessary, in this case, in order that an examination might be made, that the plaintiff submit to the employment of an anesthetic, so that the question as to the propriety of refusing the order where the examination would require the administration of an anesthetic was also raised, as well as the inquiry under discussion, namely, as to whether such an examination might properly be refused solely on the ground that it was requested for the first time during the progress of the trial; but, nevertheless, there are cases (as cited in the following paragraphs) in which the question has arisen free from such complications.

In *Southern Kansas Ry. Co.* v. *Michaels*,[95] Johnston, J., has the following language:—

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[94] 107 Mich., 496 (1895).
[95] 57 Kan., 474 (1896).

"When such an examination is necessary a timely application should be made; and it should be conducted under the control and direction of the court, by competent physicians or surgeons selected by the court. There was no showing made that an examination was essential to a full understanding of the injuries, nor was the application made in proper time. If an examination was required, the application should have been made a sufficient time before the trial commenced, in order that it might have been deliberately and carefully made, and without interfering with the progress of the trial."

A Nebraska case, *Sioux City & Pacific Rd. Co.* v. *Finlayson,*[96] is to the general effect. Another Nebraska case, *City of Chadron* v. *Glover,*[97] is very clear upon the point:—

"The record shows that the application was made during the trial. If the court was not justified on other grounds in overruling the motion it was justified in doing so because of the time when the motion was made."

The Minnesota court is committed to the same doctrine. In *Wittenberg* v. *Onsgard*[98] it is said:—

". . . defendant's request was properly refused for two reasons: (1) That the request was not seasonably made; (2) That it did not sufficiently appear that the person by whom the defendant desired the photographs taken had the necessary skill or experience properly and safely to apply the rays without injury to the plaintiff."

To the same effect is the Washington case of *Myrberg* v. *Baltimore & S. Mining & Reduction Co.*[99]

In *Turnpike Co.* v. *Baily,*[100] an Ohio case, practically the same rule is laid down; but with certain modifications. White, J., in that case, says:—

"The application for such order ought to be so made as not unnecessarily to prolong the trial, or to prejudice the

[96] 16 Neb., 578 (1884).
[97] 43 Neb., 732 (1895).
[98] 81 N. W., 14, 78 Minn., 342 (1899).
[99] 65 P., 539 (1901).
[100] 37 Ohio St., 104 (1881).

plaintiff in proving his case. Hence, where the application is not made until after the close of the plaintiff's evidence in chief, and the commencement of the introduction of the defendant's evidence, and no reason is shown for the delay in making the application, it may be refused on that ground."

This appears to be the only case in which it is hinted that the general rule may be disregarded when the defendant can show a sufficient excuse for his delay in making the application.

The courts of Georgia and Kentucky are firm in the general doctrine.[101]

Upon the other side of the matter we find only the supreme court of Iowa, in *Hall* v. *Town of Manson*,[102] already cited under another head. The doctors for the two parties, in that case, disagreed as to the mere measurements of an injured foot and ankle. The defendant's attorney asked for a measurement before the jury. The court overruled the application. And this ruling the supreme court held to be erroneous.

Again, by uniform authority it is held that no examination may be had where such a proceeding would endanger the plaintiff's life or health. A very interesting case on this point arose in Wisconsin, *O'Brien* v. *City of La Crosse*.[103] The facts will sufficiently appear by the following extract from the opinion:

". . . A full and complete examination was had by the defendant's physicians before the opening of the court

[101] Southern Bell, etc., Co. v. Lynch, 20 S. E. 500, 95 Ga., 529 (1894); Belle of Nelson Distilling Co. v. Riggs, 45 S. W., 99, 20 Ky. Law Rep'r, 499 (1898); Louisville & N. R. Co. v. McClain, 66 S. W., 391 (1902).

[102] 68 N. W., 922 (1896).

[103] 75 N. W., 81, 99 Wis., 421 (1898).

the next morning, except that the plaintiff, under the advice of her physicians, refused to permit the introduction of a catheter into her bladder, for the reason that it would endanger her life. After the defense had sworn and examined four witnesses, the defendant asked for an order compelling the plaintiff to submit to an examination by instruments, to determine the condition of her bladder. A statement having been made as to the examination which had in fact been made, the court stated that, while the court had power to order the examination, it had no power to determine the extent of such examination."

The court then holds that this was not error, and continues:—

"The defendant's physicians testified to the fact that their object was to withdraw all the urine from the bladder; that, in a healthy bladder, it was safe to do so; that there were conditions of the bladder where it was absolutely dangerous to withdraw all the urine therefrom at one time, and by so doing the walls of the bladder were certain to come together and excite inflammation; that a coming in contact with the urine in the bladder would produce decomposition, and the decomposition had the effect of producing cystitis,—a cause that was very frequent."

In *Alabama Grt. Southern Ry. Co.* v. *Hill,*[104] appears the following:—

"The examination should be ordered and had under the directions and control of the court, whenever it fairly appears that the ends of justice require the disclosure, or more certain ascertainment, of facts which can only be brought to light or fully elucidated by such an examination, and that the examination may be made without danger to plaintiff's life or health, and without the infliction of serious pain."

Wittenberg v. *Onsgard,*[105] previously cited, is an especially interesting case from the fact that in it the right to demand an examination by the use of the X-rays is involved. The court below refused to order such examination, and this refusal was held by the

[104] 90 Ala., 71 (1889).
[105] 81 N. W., 14, 78 Minn., 342 (1899).

court above not to be an abuse of discretion. Said Mitchell, J.:—

"The discovery of the X-rays is comparatively recent. Its utility, and the reliability of its results are already so well established as scientific facts that courts ought to take judicial notice of them. And, if the fact that the exposure of the person to these rays is harmless becomes as well established in science as is the accuracy of photographs taken by them, there is as much reason why, in a proper case, under proper safeguards, and at the reasonable request of the defendant, the plaintiff should be required, in a case like the present, to submit his neck to those rays for the purpose of photographing it, as there is for requiring a party to submit his person to a physical examination, as in *Wanek* v. *City of Winona,* 78 Minn., 98, 80 N. W., 851. Whether science is as yet sufficiently advanced on the subject so to hold may admit of doubt, and a person cannot be required to submit his person to any process which is liable to injure him."

Another X-ray case occurs in *Boelter* v. *Ross Lumber Co.*[106] Said Cassoday, J.:—

"We perceive no error in refusing the defendant's application for a second examination by the X-ray process. The plaintiff had submitted to one such examination, lasting two hours or more, during which he was, by accident, burned, and he refused to submit to another examination. He had also permitted two of the defendant's medical witnesses to examine him. Within the recent ruling of this court, we think there was no abuse of discretion in refusing to compel him to submit to a second examination by such X-ray process."

An extremely interesting case with regard to the circumstances under which an order for a physical examination may be refused is *Strudgeon* v. *Village of Sand Beach.*[107] In this case it would have been necessary, had an examination been had, to place the plaintiff under the influence of anesthetics. The plaintiff objected to the anesthetization; the lower

[106] 79 N. W., 243, 103 Wis., 324 (1897).
[107] 107 Mich., 496 (1895).

court refused the order; and the higher court sustained the refusal. This case is apparently unique; and certainly, the principle it enunciates is of very great importance.

As to the propriety of the trial court's refusing an examination on the ground of delicacy, the courts furnish a few, but not many, decisions. In a Washington case[108] the courts refused to compel the plaintiff to submit to an examination for the purpose of determining whether or not she was afflicted with falling of the womb, the main ground on which this was done being that of delicacy. The upper court sustained the refusal. However, it should be observed that the court added:—

"The fact that the request was for an examination by physicians selected by appellant alone was a sufficient ground for refusing it."

In *Hall* v. *Town of Manson*,[109] already cited under other heads, the upper court held that "there is nothing indelicate in the measurement of a foot or arm or ankle in a proper case." It should be added that the measurement referred to was to be had before the jury. This case, however, does not so much decide whether or not a trial judge may refuse a physical examination on the ground of delicacy, as it declares that the particular facts in the question brought up did not constitute a case of delicacy.

In the Michigan case of *Graves* v. *City of Battle Creek*,[110] it was said, obiter, by Montgomery, J.:—

[108] Smith v. City of Spokane, 16 Wash., 403 (1897).
[109] 68 N. W., 922 (1896).
[110] 95 Mich., 266 (1893).

"It will be observed that the exhibition of the arm at the point of the alleged fracture would not have been a shock to the plaintiff's sense of delicacy."

A further statement obiter, but of a rather comprehensive and suggestive character, occurs in the same case:—

"The decisions are not uniform upon this question, but the very great weight of authority is in favor of the exercise of such power by the court, under proper restriction; the rule recognizing, however, that a wide discretion is vested in the trial court, which justifies the refusal to require the examination, when the necessities of the case are not such as to call for it, or where the sense of delicacy of the plaintiff may be offended by the exhibition, or where the testimony would merely be cumulative, or where, in the judgment of the trial court, it would not materially aid the jury."

Summary of this and also of the former paper:—

1.—In a suit for personal injuries, the plaintiff may, by the weight of authority, be compelled to submit to a physical examination. This is the settled law in several states. The plaintiff cannot, however, be required to exhibit his injuries in Illinois, in Texas, in Delaware, in Massachusetts, or in Montana. With the courts of these states (those holding adversely to the existence of the power) stand the courts of the United States and also those of the territories.

2.—Even where the existence of the power is admitted, it is held that there inheres in the defendant no absolute right to require the power to be exercised; the matter rests solely in the discretion of the trial court.

3.—Such discretion, however, is subject to review on appeal.

4.—It is declared in one case that the court has no power to compel the examination after the defendant has withdrawn his request for such examination.

5.—By the great weight of authority, it is not an abuse of the discretion to refuse to order a physical examination after the beginning of the trial.

6.—Nor is it an abuse to refuse the order when the examination might endanger the plaintiff's life or health.

7.—Nor when the use of an anesthetic would be requisite in order that the examination might be made.

8.—Nor where the nature and extent of the injuries are obvious to all.

9.—Though the opinions are scanty on the point, it would seem that no abuse of the discretion lodged in the trial court is committed when the examination is refused on the ground of delicacy, and when the facts in the case bear out the trial court in its opinion that a delicate case exists. No "delicacy," however, has ever been suggested by any of these courts in connection with the matter of turning a physician's bank-account teetotally over to a plaintiff on the strength of what might possibly be a mere hypothesis or even a conspiracy.

10.—It has been suggested, further, in one case, that the court might properly refuse to grant the order "when the testimony would be merely cumulative, or where, in the judgment of the trial court, it would not materially aid the jury."

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